Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL MAHONEY, Warden,
Montana State Prison,

Petitioner,

v.

WILLIAM JAY GOLLEHON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
PAMELA P. COLLINS
Assistant Attorney General
Counsel of Record
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

(CAPITAL CASE)
QUESTIONS PRESENTED

1. Does the certificate of appealability requirement in 28 U.S.C. § 2253(c) apply to cases where the notice of appeal is filed after the enactment date of the Antiterrorism and Effective Death Penalty Act, and, if so, should the Court of Appeals' judgment be vacated and this matter remanded with instructions to determine whether a certificate should issue herein?

2. Where a pre-AEDPA habeas corpus petition containing exhausted and unexhausted claims was dismissed without prejudice after AEDPA's effective date to permit complete exhaustion, did the Court of Appeals err by declaring the subsequent appeal moot and reinstating the petition because the habeas petitioner exhausted state court remedies during the appeal's pendency?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Michael Mahoney, Warden, Montana State Prison.

The Respondent in this Court is William Jay Gollehon.

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OPINIONS AND ORDERS BELOW

The order and judgment of the Ninth Circuit, dated January 3, 2000, is unreported and reproduced in the Appendix. (App. 1a, 93a.) The District Court's order, dated April 10, 1998, dismissing Respondent's habeas corpus petition is unreported and reproduced in the Appendix. (App. 8a-9a.) A subsequent post-judgment order by the District Court, dated August 25, 1998, denying relief under Fed. R. Civ. P. 60(b) is unreported and reproduced in the Appendix. (App. 4a-7a.) The Ninth Circuit motions panel's order, dated March 1, 1999, granting a certificate of probable cause, is unreported and reproduced in the Appendix. (App. 2a-3a.) Related decisions of the Montana Supreme Court dated September 9, 1999, November 30, 1995, and October 20, 1993, are reported at, respectively, 986 P.2d 395, 906 P.2d 697 and 864 P.2d 249, and are reproduced in the Appendix. (App. 10a-92a.) This Court's order, dated October 3, 1994, denying certiorari from the Montana Supreme Court's 1993 decision is reported at 513 U.S. 827 and reproduced in the Appendix. (App. 38a.) A petition for writ of certiorari filed by Respondent, which seeks review of the Montana Supreme Court's 1999 decision, is pending currently in No. 99-7977.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Ninth Circuit was filed and entered on January 3, 2000. This petition follows within 90 days. 28

U.S.C. § 2101(c); S. Ct. R. 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(a) (1995):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

28 U.S.C. § 2254(b) (1995):

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.

28 U.S.C. § 2253(c) (1999):

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant

has made a substantial showing of the denial of a constitutional right.

INTRODUCTION

Respondent was sentenced to death eight years ago for a 1990 homicide at the Montana State Prison where he and another inmate clubbed a third inmate to death with baseball bats. His direct appeal was denied in 1993 by the Montana Supreme Court, and review by this Court was denied a year later. Aside from filing the federal habeas corpus action giving rise to this petition, Respondent sought postconviction review by the Montana Supreme Court in two proceedings, with that court's decision in the second of those proceedings presently pending before this Court on a petition for writ of certiorari. The protracted and complicated nature of this litigation underscores not only the importance of this Court's direction in *Rose v. Lundy*, 455 U.S. 509 (1982), that habeas petitions containing exhausted and unexhausted claims be dismissed without prejudice so that complete exhaustion can be effected, but also the need for the Ninth Circuit to be reminded that transparent attempts at evading *Rose* and the Antiterrorism and Effective Death Penalty Act ("AEDPA") will not be countenanced.

Before reaching the important issue raised by the Ninth Circuit's disposition below, however, this Court must be satisfied that the Court of Appeals had jurisdiction to hear the appeal in the first instance. Presently pending in *Slack v. McDaniel*, U.S. Sup. Ct. No. 98-6322, is the question whether the certificate of appealability

requirement in AEDPA, 28 U.S.C. § 2253(c), applies when the notice of appeal, but not the petition, was filed prior to AEDPA's enactment. Under § 2253(c), Congress has limited appeals to applicants who have made a substantial showing of the denial of a constitutional right. The only substantive issue before the Ninth Circuit was the District Court's alleged abuse of discretion in dismissing Respondent's mixed habeas petition pursuant to *Rose* – a fact raising the question whether the Court of Appeals possessed jurisdiction over the appeal.

STATEMENT OF THE CASE

1. Respondent William Gollehon was convicted by a jury of deliberate homicide by accountability, in violation of Mont. Code Ann. § 45-5-102(1)(a) (1989), for his participation in the beating death of Montana State prison inmate Gerald Pileggi on September 2, 1990. The state district court conducted an aggravation/mitigation hearing under Mont. Code Ann. § 46-18-301 (1989) and found beyond a reasonable doubt the existence of two aggravating factors; i.e., the offense was committed by Respondent while he was serving a sentence of imprisonment in Montana State Prison (§ 46-18-303(1) (1989)), and the offense was committed by Respondent after he had been previously convicted of another deliberate homicide (§ 46-18-303(2) (1989)). After considering all mitigating evidence presented by Respondent, the court determined that the mitigating circumstances were not sufficiently substantial to call for leniency and imposed the sentence of death. The Montana Supreme Court affirmed Respondent's conviction and sentence, *State v. Gollehon*, 864 P.2d

249 (Mont. 1993), and this Court denied Respondent's petition for writ of certiorari, *Gollehon v. Montana*, 513 U.S. 827 (1994).

On March 28, 1995, Respondent filed a motion for a new trial with the state district court, alleging that the State violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). On November 30, 1995, the Montana Supreme Court affirmed the state district court's determination that the motion was untimely and declined to reach the merits of the *Brady* claim. *State v. Gollehon*, 906 P.2d 697 (Mont. 1995). The Montana court held that Respondent could still assert his *Brady* claim in postconviction relief: "[Respondent] may still timely file such a petition under § 46-21-101, MCA; to date, he has simply *chosen* not to do so." 906 P.2d at 701.

2. On June 2, 1995, Respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 and amended the petition on March 4, 1996. As initially filed and amended, the petition included the unexhausted *Brady* claims. Petitioner moved to dismiss the mixed petition in accordance with *Rose v. Lundy*, 455 U.S. 509 (1982). The District Court found that Respondent had failed to exhaust the *Brady* claims but denied the motion to dismiss, agreeing with him that *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), required that the mixed petition be stayed while he exhausted the *Brady* claims in state court. Respondent then filed a state postconviction petition in the Montana Supreme Court on December 2, 1996 seeking review of those claims.

On March 4, 1998, Petitioner filed another motion to dismiss the mixed amended petition without prejudice,

based on recent Ninth Circuit authority which distinguished *Fetterly* and held that a district court abuses its discretion when it stays a mixed petition. *See Reutter v. Crandel*, 109 F.3d 575 (9th Cir. 1997); *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir. 1997); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997). Respondent replied by acknowledging that recent Ninth Circuit holdings did not allow a mixed petition to be stayed but requesting that, instead of dismissing the petition, the District Court allow him to delete the unexhausted claims from his petition and to hold the then fully exhausted petition in abeyance. The Ninth Circuit has authorized this "withdrawal and abeyance" procedure. *See, e.g., Calderon v. United States District Court (Thomas)*, 144 F.3d 618 (9th Cir. 1998); *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir.), *cert. denied*, 525 U.S. 920 (1998).

The District Court granted Petitioner's motion to dismiss the mixed amended petition without prejudice, and Respondent filed a notice of appeal on April 14, 1998. After the District Court clarified that the dismissal was without prejudice and refused to issue a certificate of probable cause or appealability, Respondent moved to dismiss his appeal. The Ninth Circuit, however, expressed concern over whether Respondent had been informed by his attorney that any subsequent federal habeas petition filed after the District Court's dismissal might be barred under AEDPA's one-year limitations period. *See* 28 U.S.C. § 2244(d).

Respondent then filed a motion under Fed. R. Civ. P. 60(b) for relief from the District Court's judgment, based on the Ninth Circuit's concern regarding the possible

applicability of AEDPA's one-year statute of limitations. The court denied the motion on the ground that Respondent would still have a period of time to file his post-AEDPA petition. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *overruled on other grounds, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999); *see also* 28 U.S.C. § 2244(d)(2) (the one-year statute of limitations is tolled "while a properly filed application for state post-conviction or other collateral review is pending").

3. Respondent appealed the denial of the Rule 60(b) motion on September 4, 1998 and requested a certificate of probable cause from the District Court. The District Court granted a certificate of appealability. The Ninth Circuit then allowed Respondent to withdraw his motion to voluntarily dismiss his initial appeal and consolidated the appeals. In his brief to the Ninth Circuit, Respondent set forth the sole issue on appeal as follows: "Whether the district court erred in dismissing Respondent's pre-Anti-terrorism and Effective Death Penalty habeas corpus petition instead of employing the abeyance procedure discussed in *Calderon v. United States District Court for Northern Dist. of California ("Thomas")*, 144 F.3d 618 (9th Cir. 1998)." (App. 94a.) On March 1, 1999, after all briefing was completed, a motions panel issued a certificate of probable cause regarding the initial appeal, relying on *Barefoot v. Estelle*, 463 U.S. 880 (1983), and 28 U.S.C. § 2253 (1996). The panel characterized Respondent's appeal as contending in part that "the district court . . . violated his equal protection and due process rights under . . .

[Thomas] when it dismissed his petition without prejudice instead of first allowing [him] to amend his petition to delete his unexhausted claims and then staying federal proceedings pending exhaustion of state remedies." (App. 2a.)

On September 9, 1999, the Montana Supreme Court denied Respondent's amended postconviction petition containing the *Brady* claims on the merits. *Gollehon v. State*, 986 P.2d 395 (Mont. 1999).[1] On October 25, 1999, Respondent moved the Ninth Circuit to dismiss the appeals on the ground of mootness. Petitioner opposed the motion, but on January 3, 2000, the Ninth Circuit issued the following order: "We dismiss these appeals as moot, and remand with direction that the judgment of the district court dismissing Respondent's habeas petition and the order denying Rule 60(b) relief be vacated." (App. 1a.) Thus, under the Ninth Circuit's disposition, Respondent's amended habeas petition, including the *Brady* claims which were not exhausted until September 9, 1999, will be analyzed under pre-AEDPA law.

REASONS FOR GRANTING THE WRIT

1. Presently pending before this Court in *Slack v. McDaniel*, U.S. Sup. Ct. No. 98-6322, is the question

[1] Respondent filed a petition for writ of certiorari seeking review of this decision by the Montana Supreme Court. *Gollehon v. Montana*, U.S. Sup. Ct. No. 99-7977.

whether Congress, by amending the certificate of appealability requirement in 28 U.S.C. § 2253, intended to prohibit appeals not involving any substantial constitutional issues. If this Court determines that AEDPA applies to any appeal initiated after its effective date on April 24, 1996, regardless of when the original application for relief was filed in district court, the Ninth Circuit's jurisdiction over Respondent's appeal is highly doubtful. If *Slack* is so decided, this Court should grant the writ, vacate the Ninth Circuit's judgment, and remand for reconsideration the question whether a certificate of appealability should issue herein.

2. This case calls for the exercise of the Court's supervisory powers because the Ninth Circuit, in dismissing the appeal on the plainly inapplicable ground of mootness, seeks to avoid this Court's mandate in *Rose v. Lundy*, 455 U.S. 509 (1982), that mixed habeas corpus petitions be dismissed without prejudice and additionally has sanctioned evasion of AEDPA's requirements.

I. IF THIS COURT HOLDS IN *SLACK* THAT AEDPA'S CERTIFICATE OF APPEALABILITY REQUIREMENT APPLIES TO ALL APPEALS FILED SUBSEQUENT TO THE STATUTE'S EFFECTIVE DATE, THE COURT OF APPEALS' JUDGMENT SHOULD BE VACATED AND THIS MATTER REMANDED FOR RECONSIDERATION OF THE QUESTION WHETHER THE CERTIFICATE WAS ISSUED CONSISTENTLY WITH § 2253(c).

1. After completion of briefing on the appeal, the Ninth Circuit's motions panel issued a certificate of probable cause, not a certificate of appealability, as to the

initial appeal. (App. 2a-3a.) The panel's accompanying analysis referred in part to the fact that Respondent had alleged a violation of his equal protection and due process rights when the district court followed the mandate of *Rose* and dismissed the mixed petition instead of allowing the "withdrawal and abeyance" procedure. This reference was to five sentences in Respondent's opening brief:

> [A]llowing abeyance in Gollehon's case would remove any hint of arbitrariness. In other words, from the cases we know that some death row habeas corpus petitioners have been permitted to amend out their unexhausted claims, exhaust them, and then reamend those claims back into their respective pre-AEDPA habeas petitions. Hence, denying Gollehon the right to amend, delete, and reamend would apparently turn on nothing more than the fact that Gollehon happens not to be in a district where such a procedure is being employed. Such a momentous decision in a death penalty habeas corpus case should not turn simply on the petitioner's location. This would violate due process and equal protection principles emanating from the Fifth Amendment of the United States Constitution.

(App. 98a.) Respondent cited no authority for the proposition that the District Court's refusal to adopt the "withdrawal and abeyance" procedure violated the Fifth Amendment.

Petitioner did not seek reconsideration of the motions panel determination on the basis of the panel's failure to apply the certificate of appealability requirements in AEDPA. That issue was not raised because the

Ninth Circuit has held repeatedly that if the habeas petition was filed before the enactment date of AEDPA, the new certificate of appealability requirements do not apply. *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). Other circuits are in accord with the Ninth Circuit. *Norris v. Schotten*, 146 F.3d 314, 322 (6th Cir.), *cert. denied*, 525 U.S. 935 (1998); *Emery v. Johnson*, 139 F.3d 191, 194 n.2 (5th Cir.), *cert. denied*, 525 U.S. 969 (1998); *United States v. Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997), *cert. denied*, 523 U.S. 1053 (1998); *Hardwick v. Singletary*, 122 F.3d 935, 936 (11th Cir. 1997) (per curiam), *modified*, 126 F.3d 1312 (11th Cir. 1997); *Martin v. Bissonnette*, 118 F.3d 871, 875 (1st Cir. 1997). Presently pending before this Court in *Slack v. McDaniel*, U.S. Sup. Ct. No. 98-6322, however, is the question whether the certificate of appealability requirement in § 2253(c) applies any time a certificate is requested, or a notice of appeal is filed, after the effective date of AEDPA. The notice of appeal here was filed well after that date. If this Court determines that AEDPA's provisions apply to such appeals, very substantial doubt exists here that its requirements were met and that application of pre-AEDPA standards by the Court of Appeals was not simply harmless error.

2. Under AEDPA, the certificate may issue "only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added). Issuance of a certificate is a jurisdictional condition precedent to a valid appeal that can be neither waived by an appellee nor dispensed with on equitable grounds by an appellate court. *Hohn v. United*

States, 524 U.S. 236, 247-48 (1998) (certificate of appealability is a "threshold prerequisite for court of appeals jurisdiction," comparable to the jurisdictional prerequisite of filing a proper notice of appeal); *see also* Fed. R. App. P. 22(b) ("[i]n a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253 of Title 28, United States Code").

Whether the District Court abused its discretion in dismissing the mixed habeas petition without prejudice rather than permitting the withdrawal-and-abeyance procedure clearly does not raise a constitutional question. It instead implicates only policy limitations set by statute or rule concerning the availability of habeas corpus relief. *Rose*, 455 U.S. at 510 (district court must dismiss mixed petitions because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute). Such a non-constitutional question is not reviewable on appeal under AEDPA.

Moreover, that some district courts have elected to employ the "withdrawal and abeyance" procedure rather than to follow the literal mandate of *Rose*, as the District Court below did, is a no less problematic ground for issuance of a certificate of appealability. Respondent has no due process interest in perpetuation of a particular interpretation or judicial application of federal habeas corpus statutes. *See, e.g., Harper v. Virginia Dep't of Tax.*, 509 U.S. 86, 94 (1993) ("[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions for near a thousand

years' "). Similarly, he cannot complain of an infringement of his equal protection rights if, as a matter of law, the District Court's determination to dismiss his petition without prejudice is held ultimately to be an appropriate remedy under *Rose*; i.e., the "right" at issue is not a particular result but equal access to the judicial process. *Missouri v. Evans*, 101 U.S. 22, 30 (1879) ("[t]he last restriction, as to equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress"). Respondent's equal protection claim also proves too much, since if credited it effectively would destroy the "hierarchical court system" (*Hubbard v. United States*, 514 U.S. 695, 719 (1995) (Rehnquist, C.J., dissenting)) existing in this nation by making the decision of the first court to speak on an issue binding on all other courts. Congress has allocated States and other geographical areas subject to United States jurisdiction to particular circuits (28 U.S.C. § 41) and established a procedure for appellate review of decisions by federal district courts within those circuits (*id.* §§ 1291, 1292, 1295, 1296) and for appellate or certiorari review by this Court (*id.* §§ 1253, 1254). It is within this structure that Respondent's claimed right to the "withdrawal and abeyance" procedure must be adjudicated, and this structure provides Respondent with all equal protection to which he is entitled. *Cf. Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 81 (1930) ("Different courts of appeal may be set up for different portions of the State. It is thus well established that there is no

requirement of the Federal Constitution that the State shall adopt a unifying method of appeals which will insure to all litigants within the State the same decision on particular questions which may arise").

Although it appears plain that a "constitutional issue" within the purview of § 2253(c)(2) was not raised below, it also appears appropriate to permit the Court of Appeals to make that determination in the first instance. The motions panel proceeded in its decisionmaking on the assumption that pre-AEDPA statutes governed, and its reference to the due process and equal protection claim conclusorily asserted by Respondent cannot be read to mean that it believed he had made "a substantial showing of the denial of a constitutional right" for § 2253(c)(2) purposes. Remand is proper under these circumstances. *See, e.g., United States v. Lanier*, 520 U.S. 259, 271-72 (1997); *Denton v. Hernandez*, 504 U.S. 25, 31 (1992).

II. THE NINTH CIRCUIT'S JUDGMENT IMPROPERLY ALLOWS RESPONDENT TO AVOID APPLICATION OF *ROSE* AND AEDPA.

In 1995 and 1996 the District Court abused its discretion when it refused to follow *Rose*, which requires dismissal of petitions containing unexhausted claims, and stayed Respondent's "mixed" habeas petition rather than dismissing it. The court corrected this error in 1998 by reconsidering its prior order and dismissing the petition. The appropriateness of this disposition under both *Rose* and contemporaneous Ninth Circuit authority was indisputable. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th

Cir. 1997) ("The district court did not err by dismissing Greenawalt's preliminary petition on the ground that it contained an unexhausted claim. Supreme Court precedent, along with our own, compels that conclusion"). The panel below, of course, was bound not only by *Rose* itself but also by the prior circuit precedent applying it, since there was no intervening contrary authority by this Court. *See, e.g., United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990). To escape its clear obligation to affirm the District Court's judgment, the panel resorted to what, in reality, was a pretextual ground for resolving the appeal in Respondent's *favor*: mootness. For very obvious reasons the appeal was not moot, and for similarly obvious reasons the Court of Appeals' judgment should be vacated and the matter remanded with instructions to enter judgment affirming the District Court's dismissal of the habeas petition.

1. Respondent's appeal was not mooted by the Montana Supreme Court's 1999 decision rejecting his *Brady* claims. The central question in determining mootness during appellate proceedings is whether, despite the occurrence of an intervening event, a decision continues to be justified by a sufficient prospect that the ruling will have an impact on the parties. *See Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam); *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Here, the appeal was not moot because a decision affirming the District Court's judgment would assist Petitioner significantly in that Respondent's *entire* habeas petition, upon refiling, would be subject to AEDPA. This is not, in short, a case where "one or both of the parties plainly lacks a continuing interest, as when the parties have settled or a plaintiff

pursuing a nonsurviving claim has died." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 710 (2000). Indeed, both parties have precisely the same interest in the appeal's outcome now as they did before the Montana Supreme Court's decision in the second post-conviction proceeding.

The inapplicability of the mootness doctrine is painfully apparent in the Ninth Circuit's remand order. It found that the appeal was moot but then vacated the District Court's judgment and *reinstated* the habeas petition – thereby providing Respondent with precisely the relief he would have obtained had he prevailed on the merits of his appeal.[2] Obviously, once it has been determined that the case has become moot on appeal, the appellate court should not decide the merits. Instead, as this Court has held often, "[w]hen a civil case becomes moot pending appellate adjudication, 'the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *see also Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (per curiam) (directing *Munsingwear* remedy where arbitration decision against appellee rendered moot question whether grievance was arbitrable). The remedy fashioned by the Ninth Circuit is

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[2] The Ninth Circuit's remand order potentially provided Respondent with a *more favorable* result because it removed the uncertainty regarding whether the *Brady* claims would be subject to AEDPA upon amendment of the petition. *See Slack v. McDaniel*, U.S. Sup. Ct. No. 98-6322.

unprecedented in the context of a mootness determination and reflects that, in fact, it intended to resolve the *merits* of the appeal, not to relieve the parties of potential prejudice from the effect of a judgment which became unreviewable because of a change in circumstances during the appeal's pendency.[3]

2. That the Ninth Circuit's judgment runs counter to *Rose* need hardly be belabored. There, this Court concluded that "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full redress first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error," and that such a rule furthers the goal of ensuring federal claims "will . . . be accompanied by a complete factual record to aid the federal courts in their review." 455 U.S. at 518-19. Reducing "piecemeal litigation" through complete exhaustion, moreover, was seen by the Court as providing the likelihood of "a more focused and thorough [federal court] review." *Id.* at 520. The importance of these interests demanded a straightforward, per se rule: "[A] district court must dismiss habeas petitions containing both unexhausted and exhausted claims" when, as here, the habeas petitioner elects not to amend

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[3] This Court has recognized limited exceptions to the *Munsingwear* remedy where mootness occurs by virtue of post-judgment settlement or through unilateral action taken by the party against whom the judgment runs. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). Neither of those exceptions applies here, but in any event neither authorizes the appellate court to *reverse*, rather than to leave in place, the lower court's judgment.

the petition by removing the unexhausted claims. *Id.* at 522.

It warrants emphasis that the present matter does not require this Court to pass upon the legitimacy of the "withdrawal and abeyance" procedure employed by some district courts and upheld as an appropriate exercise of discretion by the Ninth Circuit. *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998); *accord Calderon v. United States District Court (Thomas)*, 144 F.3d 618 (9th Cir. 1998). The District Court below, in contrast to those in *Taylor* and *Thomas*, did not follow that procedure, opting rather to adhere to the literal mandate of *Rose* when Respondent declined to amend his petition without first being granted the assurance of a stay pending resolution of his ongoing state court postconviction relief proceeding. There is no basis in this Court's jurisprudence for deeming the District Court's discretion with respect to disposition of mixed habeas petitions constrained by the *obligation* to stay the federal action while the petitioner completes exhaustion, and even the Ninth Circuit has never so suggested.

3. The error in the Ninth Circuit's judgment has more than academic consequences to the parties. Any newly filed petition will be subject to AEDPA, and its provisions substantially modified prior habeas corpus procedures. Respondent thus would be subject to rigorous limitations on second or successive petitions (28 U.S.C. § 2244(b)); to a one-year statute of limitations on the filing of the petition (28 U.S.C. § 2244(d)(1)); to stricter limitation on appeals (28 U.S.C. § 2253(c)); to a more

deferential standard of review for state court determinations (28 U.S.C. § 2254(d)); to a very exacting presumption of correctness for state court factual determinations (28 U.S.C. § 2254(e)); and to increased limitations on evidentiary hearings in federal courts (28 U.S.C. § 2254(2)). Taken as a whole, these modifications reflect Congress's intent to accelerate the federal habeas process and to limit the availability of habeas relief by giving greater deference to adjudications by state courts of prisoners' federal claims. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (AEDPA's "central concern" is that the merits of a concluded criminal proceeding "not be revisited" absent "a strong showing of actual innocence").[4]

The Court of Appeals' judgment manifests palpable hostility toward the significant habeas corpus reforms embodied in AEDPA. The only plausible reason for overturning the District Court's literal compliance with *Rose*'s

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[4] The congressional floor debates concerning AEDPA support that intent. For example, Senator Specter explained that reform was sorely needed because "[t]he great writ of habeas corpus" was being "applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the judicial system." 141 Cong. Rec. S4591 (daily ed. Mar. 23, 1995). Representative Hyde explained that reform was necessary to preempt the "abuse of habeas corpus" by convicted capital murderers whose sole aim is to "stretch it out." 142 Cong. Rec. H2182, H2184, H2249 (daily ed. Mar. 13-14, 1996). Representative McCollum, a co-proponent of the bill, expressed a similar sentiment, explaining that, by allowing death row inmates into federal court "one time and one time only," the bill would end "the seemingly endless appeals" and "15- and 20-year delays of carrying out the death penalty." 142 Cong. Rec. H2143 (daily ed. Mar. 13, 1996).

mandate was a desire to prevent application of AEDPA's provisions to the new petition that presumably will be filed in the wake of the Montana Supreme Court's most recent decision. This Court should not countenance such a patent attempt to evade both its own precedent and congressional policy-making.

CONCLUSION

If this Court determines in *Slack v. McDaniel*, U.S. Sup. Ct. No. 98-6322, that AEDPA applies to any notice of appeal filed after its effective date, it should grant this petition, vacate the Court of Appeals' judgment, and remand for reconsideration the question whether a certificate of appealability under 28 U.S.C. § 2253(c) should be issued.

Alternatively, the Court should grant this petition, summarily reverse the Court of Appeals' judgment, and affirm the District Court's judgment.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
PAMELA P. COLLINS
Assistant Attorney General
Counsel of Record
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

March, 2000

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM JAY GOLLEHON, Petitioner-Appellant, v. MICHAEL MAHONEY, Warden, Montana State Prison, Respondent-Appellee.	Nos. 98-99005, 98-99027 D.C. No. CV-95-00037-H-CCL ORDER (Filed Jan. 3, 2000)

Before: BROWNING, WIGGINS, and KLEINFELD, Circuit Judges.

We dismiss these appeals as moot, and remand with direction that the judgment of the district court dismissing Gollehon's habeas petition and the order denying Rule 60(b) relief be vacated.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JAY GOLLEHON, Petitioner-Appellant, v. MICHAEL MAHONEY, Warden Montana State Prison, Respondent-Appellee.	No. 98-99005, 98-99027 DC# CV-95-00037-CCL Montana ORDER (Filed March 1, 1999)

Before: CANBY, O'SCANNLAIN, and WARDLAW, Circuit Judges

Gollehon contends the district court erred under *Rose v. Lundy*, 455 U.S. 509 (1981), and violated his equal protection and due process rights under *Calderon v. United States Dist. Court ("Thomas")*, 144 F.3d 618 (9th Cir. 1998), when it dismissed his petition without prejudice instead of first allowing Gollehon to amend his petition to delete his unexhausted claims and then staying federal proceedings pending exhaustion of state remedies. Gollehon's contentions are debatable among jurists of reason. *See Thomas*, 144 F.3d at 620 (denying State's petition for mandamus because withdrawal and abeyance procedure is "entirely consistent with established law"); *see also Calderon v. United States Dist. Court ("Taylor")*, 134 F.3d 981, 986 (9th Cir. 1998) ("*Rose* specifically provided habeas petitioners with the option of amending their

applications to delete unexhausted claims rather than suffering a dismissal"), *cert. denied*, 119 S.Ct. 274 (1998).

The notice of appeal is construed as a request for a certificate of probable cause, and so construed, is GRANTED. *See Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); Fed. R. App. P. 22(b) (West 1996); 28 U.S.C. § 2253 (West 1996).

The Clerk shall calendar this case during the week of May 3, 1999 in Seattle.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

WILLIAM GOLLEHON,

Petitioner,

-v-

MIKE MAHONEY, Warden,
Montana State Prison,

Respondent.

CV 95-37-H-CCL

ORDER

(Filed Aug. 26, 1998)

* * *

Before the court is Petitioner's motion pursuant to Rule 60(b) of the F.R.Civ.P. for relief from this court's judgment of April 10, 1998, dismissing Petitioner's habeas corpus claims without prejudice. As none of the other subclauses of Rule 60(b) apply in this matter, the court determines this motion to be brought pursuant to Rule 60(b) (6).

F.R.Civ.P. Rule 60(b) (6) is a catch-all provision, authorizing a court to grant relief from a final judgment for any reason not otherwise specified by the rule. But it is only to be applied sparingly. As the Ninth Circuit has noted, "[t]he rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Apline Land & Reservoir, Co.*, 948 F.2d 1047, 1049 (1993). Such circumstances do not exist in this case.

Petitioner asserts that relief is required from this court's judgment dismissing without prejudice his habeas corpus claim because he otherwise risks having that

claim barred by the limitations period imposed on habeas corpus claims by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 22 U.S.C. §2244. This claim is erroneous.

The AEDPA dramatically changed the landscape for post-conviction review. Prior to the AEDPA's enactment, petitioners faced no time-related limitations on the filing of habeas corpus claims. The AEDPA, however, imposed a one-year limitations period, after which the right to file a habeas corpus claim would be lost. See 28 U.S.C. § 2244(d) (1). Recognizing the hardship that retroactive application of this rule would cause, the Ninth Circuit held that "AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment." *Calderon v. United States District Court for the Central District of California*, 128 F.3d 1283, 1287 (9th Cir. 1997). The AEDPA came into effect on April 24, 1996, meaning that the one-year period imposed by the act on state prisoners whose convictions had become final prior to the AEDPA enactment would expire no sooner than April 23, 1997.

But the AEDPA also provided for tolling of this limitations period. In relevant part, 28 U.S.C. 2244(d) (2) provides that the one-year statute of limitations imposed by the Act is tolled "while a properly filed application for State post-conviction or other collateral review is pending. . . . " As the Tenth Circuit has recognized, "[t]he clear force of the statutory language in § 2244(d) (2) requires the federal courts to toll time spent in state-court post-conviction litigation." *Hoggro v. Boone*, No. 97-6383, 1998 WL 419727, at *3 (10th Cir. June 24, 1998).

On June 6, 1995, petitioner Gollehon filed a habeas corpus petition with this court. Subsequently, on December 2, 1996, he filed a state post-conviction petition. Thus petitioner has been, and remains, continuously involved in "[s]tate post-conviction [and] other collateral review with respect to" his conviction and death sentence since prior to the enactment of the AEDPA. 28 U.S.C. § 2244(d)(2). As a result, his one-year period has been tolled since the enactment of the AEDPA. This tolling applies to both his exhausted state claims and to the claims he continues to pursue in state court. As our sister district court for the Northern District of California has noted:

> to achieve its goal of curbing the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner, § 2244(d)(2) must toll the limitations period on all exhausted claims and all unexhausted claims pending in state court.

Ashmus v. Calderon, 977 F. Supp. 987, 922 (N.D. CA 1997). Consequently, Petitioner Gollehon will have a full year from the time he exhausts his state court remedies to file a habeas corpus petition in federal court pursuant to the AEDPA. Accordingly,

IT IS HEREBY ORDERED that the motion for relief from judgment pursuant to F.R.Civ.P. Rule 60(b)(6) is DENIED.

The clerk is directed to notify the parties of entry of this order.

Done and dated this 25th day of August, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

WILLIAM GOLLEHON,

Petitioner,

-v-

MICHAEL MAHONEY, Warden,
Montana State Prison,

Respondent.

CV 95-37-H-CCL

ORDER

(Filed Apr. 10, 1998)

* * *

Before the court is Respondent's second motion to dismiss death row inmate William Gollehon's petition for writ of habeas corpus. On August 6, 1996, the court denied Respondent's initial motion to dismiss Gollehon's petition even though it contained claims that he had not yet exhausted in the state courts. In reaching its decision to stay the execution and to hold the habeas petition in abeyance while Petitioner exhausted his claims in the state system, the court relied upon *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), which held that a district court abused its discretion in refusing to stay a mixed petition while a capital defendant exhausted his state remedies. *Id.* Respondent now argues, and Petitioner apparently recognizes, that a trio of recent Ninth Circuit cases has made it clear that the "stay-and-abeyance" procedure employed in such mixed-petition cases is no longer proper, and *Fetterly* has been limited to the unique facts of that case. *See Calderon v. United States District Court for the Northern District of California*, 1998 WL 24138 (9th Cir.

1998); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997); *Reutter v. Crandel*, 109 F.3d 575 (9th Cir. 1997). Consequently, the Ninth Circuit has clearly held that district courts are to dismiss mixed petitions as set forth in *Rose v. Lundy*, 455 U.S. 509 (1982). In this case, Petitioner is pursuing post-conviction relief in the state courts while his petition containing some of the same claims is being held in abeyance in this court. Under the trio of cases listed *supra*, the court is left with little choice but to dismiss the petition and dissolve the stay of execution. Accordingly,

IT IS HEREBY ORDERED that Respondent's motion is GRANTED and the petition for writ of habeas corpus is DISMISSED. All relief is denied.

IT IS FURTHER ORDERED that the stay of execution is DISSOLVED.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 10th day of April, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

William GOLLEHON, Petitioner,

v.

STATE of Montana, Respondent.

No. 96-684.

Supreme Court of Montana.

Sept. 9, 1999.

Rehearing Denied Oct. 21, 1999.

OPINION

¶ 1 The Petitioner, William Gollehon, filed his initial Petition for Postconviction Relief pursuant to §§ 46-21-101 through -201, MCA, on December 2, 1996. The State responded by moving to dismiss the petition for failure to state a claim for relief.

¶ 2 The Petitioner was convicted in the District Court of Powell County of deliberate homicide by accountability and sentenced to death on March 19, 1992. The victim of the homicide, Gerald Pileggi, was severely beaten during a softball game in the prison exercise yard and died from the injuries. The Petitioner's conviction and death sentence were affirmed by this Court in *State v. Gollehon*, 262 Mont. 1, 864 P.2d 249 (1993), *cert. denied*, 513 U.S. 827, 115 S.Ct. 95, 130 L.Ed.2d 45 (1994), *reh'g denied*, 274 Mont. 116, 906 P.2d 697 (1995).

¶ 3 On March 24, 1995, the District Court conducted a hearing to set an execution date. During the hearing, Gollehon requested that the prosecution disclose what assistance, if any, it provided to its two key witnesses,

J.D. Armstrong and William Arnot, to be released early from their sentences. Gollehon represented to the court that he had received information that the State had assisted both witnesses to obtain early releases.

¶ 4 During the hearing, the District Court granted Gollehon's request for discovery of pretrial agreements between the State and the witnesses but denied the request as to post-trial assistance or agreements. The State later disclosed that there were no pretrial agreements to assist the witnesses.

¶ 5 In his initial Petition for Postconviction Relief, Gollehon asserts that his rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. Petitioner argues that the State has a duty to disclose any advantageous treatment that witnesses Armstrong and Arnot may have received post-trial. The Petitioner further alleges that any benefits that these witnesses received in return for testifying against him cast doubts upon their credibility. He argues that such a disclosure could aid him in convincing the District Court, this Court, or both, that he is entitled to a new trial or a new sentencing hearing to reevaluate the death sentence imposed.

¶ 6 On March 25, 1997 this Court, upon review of Gollehon's petition and the State's response, concluded that Petitioner was entitled to the discovery of any post-conviction agreements the State made with witnesses Armstrong and Arnot to provide assistance to them and the exact nature of any assistance provided to these witnesses. We further concluded that once such information

is disclosed, the petitioner would be entitled to amend his petition should he so desire.

¶ 7 Discovery was subsequently pursued, most notably, the depositions of witness Armstrong and attorney Wendy Holton. Holton, a private attorney who specializes in criminal matters, was contacted by Assistant Attorney General John Connor to assist Armstrong in his effort for an early release.

¶ 8 On March 1, 1999, Gollehon filed his Amended Verified Petition for Postconviction Relief (Amended Petition) pursuant to §§ 46-21-101, and – 203, MCA. The Attorney General responded by moving to dismiss Gollehon's Amended Petition. Both the Petitioner and Attorney General have requested oral argument.

¶ 9 The Amended Petition raises six claims for relief. We shall address each claim for relief in order. Before doing so, however, we deem it first appropriate to address Gollehon's omnibus contentions and his general allegations of constitutional violations.

¶ 10 The Petitioner alleges that his rights under both the United States and Montana Constitutions were compromised, specifically those rights found in the Montana Constitution, Article II, Sections 16, 17, 19, 22, 24, 26, 28 and 34 and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In these omnibus contentions, however, the Petitioner fails to cite to authority or offer specific argument to support his conclusionary statements. Thus, lacking any specific arguments or authority to support these contentions, we will not address them any further. *See* M.R.App. P.

23(a)(4); *State ex rel. Booth v. Montana Twenty-First Judicial Dist.*, 1998 MT 344, ¶ 35, 972 P.2d 325, ¶ 35.

First Claim for Relief

¶ 11 Gollehon alleges that there were undisclosed pretrial agreements in exchange for Armstrong's testimony. Gollehon argues that the following agreements existed:

1. Witness Armstrong was promised by prison officials that he would be a trustee at the Powell County Jail;

2. Assistant Attorney General John Connor promised Armstrong he would not go back to Montana State Prison; and

3. Armstrong was promised that he would be housed in the Powell County Jail until he earned parole, prerelease, or discharge.

¶ 12 Gollehon further alleges that the State failed in its duty to disclose certain gratuitous benefits conferred upon Armstrong, post-trial, and in the absence of any pretrial agreement.

¶ 13 Gollehon asserts that the disclosure requirements under § 46-15-322(1)(e), MCA, and the prosecution's responsibilities set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), compel such disclosure. Gollehon further contends that under §§ 46-15-327 and 46-18-310, MCA, the State had a continuing duty to disclose any gratuitous benefits Armstrong received, post-trial, because such information would tend to reduce or mitigate his sentence.

¶ 14 The suppression by the prosecution of material evidence favorable to the accused violates the defendant's Fourteenth Amendment guarantee of due process. *See Brady*, 373 U.S. at 86, 83 S.Ct. at 1196, 10 L.Ed.2d at 218. This duty applies to impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985). The prosecution may violate the principles set forth in *Brady* by failing to disclose agreements with a prosecution witness in exchange for testimony. Promises made to a witness in exchange for testimony go directly to the credibility of the witness. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108-09 (1972). The duty of disclosure is dependent, however, upon an agreement or understanding with tangible benefits. Where there is no agreement, there is no duty to disclose. *See Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir.1994), *cert. denied*, 513 U.S. 1061, 115 S.Ct. 673, 130 L.Ed.2d 606 (1994).

¶ 15 To establish a *Brady* violation, the petitioner must establish that: (1)the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence nor could he have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *See Mills v. Singletary*, 63 F.3d 999, 1014 (citation omitted) (11th Cir.1995), *cert. denied*, 517 U.S. 1214, 116 S.Ct. 1837, 134 L.Ed.2d 940 (1996).

¶ 16 Gollehon argues that the State made a deal with key witness Armstrong which was never disclosed. He argues that in exchange for Armstrong's testimony, the

State reinstated his good time, and removed his dangerous offender status. Gollehon argues further that attorney Wendy Holton, contacted by Assistant Attorney General John Conner to assist Armstrong, and Conner assisted in getting Armstrong released by testifying on his behalf and writing letters to the Parole Board. He also claims that Warden McCormick aided by unilaterally overruling a prison committee recommendation that denied Armstrong's restoration of good time.

¶ 17 Petitioner relies, in part, on a letter dated December 31, 1991 from witness Armstrong to Connor. The Petitioner argues that Armstrong states in the letter that prison officials represented to him before trial that he would be a trustee at the Powell County Jail.

¶ 18 A complete review of the letter, however, discloses nothing about what was told to Armstrong. In fact, in one part of the letter Armstrong indicates that he did not believe that he had been promised trustee status in exchange for his testimony. In another part of the letter, he specifically states that he did not expect to receive any special treatment for anything that he had done. Although, Armstrong desired to be a trustee at the jail, he has failed to present any convincing evidence of an undisclosed deal of trustee status in exchange for his testimony, pretrial.

¶ 19 Holton testified in her deposition that she represented to the Parole Board in the clemency application, that Armstrong provided his testimony without requesting any benefit or consideration other than protection.

¶ 20 Gollehon relates to other documents, including a letter written by Armstrong to Warden McCormick, dated

November 23, 1991. Armstrong was requesting that he be reclassified so that he could work as a trustee in the Powell County Jail. McCormick's response, however, indicates that his request to be reclassified was rejected.

¶ 21 The Petitioner also refers to a letter dated February 2, 1992 that Armstrong wrote Assistant Attorney General Connor after he was transferred back to Montana State Prison. In that letter, Armstrong asserts that Connor promised him that he would never go back to the prison.

¶ 22 The Petitioner, however, has not presented any evidence that Connor made the above statement to Armstrong prior to trial or in exchange for his testimony. Further, in the same letter, Armstrong states at two different times that Connor did not break any promise to him.

¶ 23 Gollehon also refers to a letter dated October 24, 1991 from Armstrong to an unnamed prison official where he asserts that he was promised things before trial. In his deposition, however, Armstrong explained that it probably related to a promise of guaranteed safety. Such a promise was disclosed to the jury during Armstrong's testimony at trial.

¶ 24 It is important to note that the jury which convicted Gollehon of this homicide was aware that Armstrong had been promised safety in return for his testimony. At trial, evidence was presented that Armstrong was receiving assurances of safety by the State in the event he testified. Gollehon had an opportunity to explore what these "safety" measures might entail during trial. On August 30, 1991, Armstrong voluntarily provided defense counsel an interview which was tape-

recorded and transcribed. During this interview, Armstrong stated that he came forward with testimony because he felt that he should and not to get something in return. He also stated that the State assured him that his safety would be guaranteed but he did not know how that would be accomplished. During trial, Armstrong testified that he was not promised anything in return for his testimony other than a guarantee of his safety. He testified that every step would be taken to guarantee his safety, and further, no one assured him assistance in obtaining parole.

¶ 25 In summary, we conclude that the Petitioner has not established the existence of any undisclosed pretrial agreement between the State and Armstrong in exchange for his testimony. The Petitioner has established no more than what was presented to the jury during his trial; Armstrong was assured his personal safety if he testified. This was corroborated in Armstrong's deposition taken on August 18, 1998, when he testified that the only guarantee he received was for his safety by being housed in protective custody in the Powell County Jail in Deer Lodge. Although we concede that the State went to great lengths to assist Armstrong in his post-trial efforts for early release, we see nothing in the pretrial conduct of the prosecution that would constitute a *Brady* violation.

¶ 26 In regard to undisclosed post-trial benefits, Gollehon asserts that Connor contacted Holton after his trial to ask if she would assist Armstrong before the Parole Board. He then asserts that Connor wrote a letter to the Parole Board in support of Armstrong's application for clemency; and that when the Board denied the application, Connor and Warden McCormick went to "great

lengths" to secure Armstrong's release, culminating in Governor Stephens' grant of clemency, which removed his "dangerous" designation and made him prematurely eligible for parole. Gollehon asserts that the failure to disclose the above events which occurred post-trial and in the absence of a pretrial agreement, violated his *Brady* due process rights.

¶ 27 In order for post-trial assistance to be relevant, there must have been an agreement for parole before trial in order to support a *Brady* violation. In the absence of evidence of a pretrial agreement, there can be no *Brady* violation because no evidence was suppressed from the jury. Armstrong testified at his deposition that, prior to trial, he was never promised restoration of any good time. He said the subject never came up. Again, any assistance that occurred after trial, must be as a result of a pretrial agreement to support a *Brady* violation.

¶ 28 Gollehon further argues that the State's failure to disclose Armstrong's premature release violates his constitutional rights because he could have argued to this Court and a sentencing court that the benefits cast doubt on Armstrong's credibility. He asserts that such evidence could have been established as a "mitigating circumstance" in terms of his sentence and could have been used to argue "lingering doubt" of his guilt. In support he cites *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

¶ 29 Mitigating evidence includes evidence that relates to a defendant's character, background, or the circumstances of the offense before the sentencing judge that militate against imposing the death penalty. *See State*

v. Smith, 280 Mont. 158, 931 P.2d 1272, 1282 (1996), *cert. denied*, 522 U.S. 965, 118 S.Ct. 410, 139 L.Ed.2d 314 (1997). However, lingering doubt of the defendant's guilt is not an appropriate mitigating circumstance because it is not an aspect of the defendant's character, record, or the circumstance of the offense. In *Franklin*, 487 U.S. at 174, 108 S.Ct. at 2327, 101 L.Ed.2d at 166, the United States Supreme Court stated the sentencing judge may not be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." The Court noted, however, that capital juries, in the sentencing phase, were not mandated to reconsider their "residual doubts" over a defendant's guilt. Such doubts do not relate to the defendant's "character," "record," or a "circumstance of the offense." *See Franklin*, 487 U.S. at 174, 108 S.Ct. at 2327, 101 L.Ed.2d at 166.

¶ 30 We further conclude that such evidence would not have been considered by this Court under our function dictated by § 46-18-310, MCA. We are required to determine pursuant to § 46-18-310(2), MCA, whether the evidence supports the sentencing judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances. *See Smith*, 280 Mont. at 170, 931 P.2d at 1279.

¶ 31 The First Claim for Relief is denied.

Second Claim for Relief

¶ 32 Gollehon argues in his Second Claim for Relief that there was overwhelming post-trial evidence that Armstrong perjured himself at trial. This, according to the Petitioner, resulted in the deliberate deception of the

court and jurors by the presentation of false evidence, resulting in a violation of his rights under the Fourteenth Amendment.

¶ 33 To prevail on this claim, Gollehon must establish that: (1) the witness's testimony was actually false; (2) the testimony was material to the verdict; and (3) the prosecutor knew or believed the testimony to be false. *See Fuller v. Johnson*, (5th Cir.1997), 114 F.3d 491, 496, (5th Cir.1997) *cert. denied*, 522 U.S. 963, 118 S.Ct. 399, 139 L.Ed.2d 312 (1997). False evidence is "material" only if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *See Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996), *cert. denied*, 519 U.S. 1094, 117 S.Ct. 773, 136 L.Ed.2d 718 (1997).

¶ 34 Gollehon argues that Armstrong's post-trial behavior "never changed," therefore, Armstrong must have lied at trial about his reasons for coming forward. Holton, on the other hand, testified that she believed that Armstrong had made efforts to change his life and Connor believed that Armstrong was sincere in his rehabilitation efforts and that he provided truthful testimony at the Pileggi trial. The fact that Armstrong failed at rehabilitation is not sufficient to demonstrate that he lied at trial.

¶ 35 Gollehon obtained an affidavit from Monty Carrillo stating that Armstrong immediately violated his parole conditions. However, Carrillo does not state that Armstrong's testimony at trial was false. Carrillo merely speculates and draws inferences from Armstrong's subsequent conduct on parole. Gollehon also refers to information contained in an affidavit by Montana State Senator Thomas Keating. However, Keating concedes that he does

not know the details of Armstrong's trial testimony or whether it was true or not.

¶ 36 Gollehon has not sustained his burden to establish that Armstrong's trial testimony was actually false or that the prosecutor knew or believed it to be false. The Petitioner infers that Armstrong must have lied at trial about his reasons for coming forward. The fact that Armstrong's efforts at rehabilitation were not successful is not sufficient to demonstrate that he lied at trial.

¶ 37 The Second Claim for Relief is denied.

Third Claim for Relief

¶ 38 Gollehon asserts that the State's alleged failure to disclose the substantial benefits it gratuitously conferred upon witness William Arnot, post-trial, and in the absence of a formal pretrial agreement, violated his *Brady* due process rights.

¶ 39 The Petitioner points out that Arnot has a lengthy criminal record and has escaped from custody at least three times. During one escape he possessed a deadly weapon. Twelve days after receiving an additional prison term for this offense, Arnot came forward for the first time and stated that he witnessed the Pileggi homicide. Arnot was immediately removed from prison and placed with Armstrong in a local jail. Arnot testified that he and Armstrong discussed the case and he came forward because it was "the right thing to do."

¶ 40 After Arnot testified, Connor inquired about his prerelease designation. Even though Arnot's most recent escape made him ineligible for prerelease, Department of

Corrections employee Jim Pomroy arranged for an exception to be made. Arnot again escaped custody from the prerelease center. Arnot later turned himself in to Connor and was transported to the Jefferson County Jail.

¶ 41 Two months later, Pomroy requested that the Parole Board consider Arnot for parole because he was "the primary witness in the Pileggi murder trial." The Board granted Arnot parole and he was released one month later. After his release, Arnot continued to engage in criminal conduct and again escaped from official detention. Arnot was apprehended and sentenced to an additional two years in prison and his parole was revoked. Arnot was discharged on May 15, 1996, and has been arrested at least twice since then.

¶ 42 Gollehon asserts, as he did with Armstrong, that the State's failure to disclose alleged post-trial benefits to Arnot, in the absence of any pretrial agreement, violates his constitutional rights because he could have argued to the sentencing court and this Court, on appeal, that the benefits Arnot received directly impacted his credibility. As with Armstrong, in the absence of proving a pretrial agreement in exchange for testimony, gratuitous post-trial benefits conferred on Arnot do not constitute a *Brady* violation.

¶ 43 The Third Claim for Relief is denied.

Fourth Claim for Relief

¶ 44 Gollehon contends that the State is responsible for an alleged "substantial delay" in bringing his case to a "full and final conclusion," in violation of his rights

under Article II, Sections 17 and 22 of the Montana Constitution and the Eighth and Fourteenth Amendments of the United States Constitution, and that his death sentence should be vacated. Essentially, the Petitioner argues that an unusually long period of time on death row implicates the constitutional ban on cruel and unusual punishment.

¶ 45 Petitioner complains that the *Brady* claim is causing the alleged delay and it is the State which is responsible for lengthy litigation of the claim. His argument finds its genesis in *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995), a denial of certiorari, where Justices Stevens and Breyer suggested that such an argument would "benefit from further study" and that the issue should be postponed until it has been addressed by other courts.

¶ 46 In *Smith*, 280 Mont. at 183-85, 931 P.2d at 1287-88, we rejected a claim that the defendant's rights of due process and to be free from cruel and unusual punishment were violated because of the amount of time he spent on death row and the number of sentencing hearings held in his case. Smith also relied on Justice Stevens' memorandum in *Lackey*.

¶ 47 Gollehon's argument is premised on the contention that his length of time on death row was caused by a delay in the post-trial proceedings caused by the State. Yet, despite this Court's urging on two occasions to file his postconviction petition, the Petitioner continued the delay by filing a federal habeas corpus petition and an amended petition which included a *Brady* claim which he knew had not been exhausted in the state courts. The

federal court noted this and, at the Petitioner's request, stayed it pending the exhaustion of his *Brady* claim in the state court. Gollehon ultimately filed his petition on December 2, 1996, four years and nine months after the date of conviction, coming just under the then five-year deadline. Under the circumstances, we conclude that the majority of the delay in this case was caused by the Petitioner pursuing his constitutional and statutory rights and not caused by the actions of the State.

¶ 48 The Fourth Claim of Relief is denied.

Fifth Claim for Relief

¶ 49 Gollehon requests that we reconsider our rulings and judgment with regard to issues Nos. 5 and 7 of his direct appeal, because the State claims in federal court that he did not present a due process and fair notice claim under the Fourteenth Amendment with regard to whether the death penalty could be applied for deliberate homicide by accountability.

¶ 50 The Petitioner focuses on the dissent of Justice Gray in his direct appeal and concludes that this Court understood and addressed his due process and fair notice claim when it considered his argument under the rule of lenity. Although the Petitioner states that he is confident that the federal courts will rule that these claims were addressed, he requests that we revisit claims Nos. 5 and 7 of his direct appeal for the following reasons: (1) to give this Court every opportunity to pass on a substantial and important constitutional claim before it reaches a federal venue; (2) to clarify how this Court actually dealt with these issues; (3) and because consideration of a matter

previously decided in direct appeal is permissible under the 1995 postconviction statutes.

¶ 51 We decline to again address these issues. Postconviction relief is not available upon claims that a petitioner could have raised on direct appeal. *See* § 46-21-105(2), MCA. If the Petitioner failed to adequately raise these issues in his direct appeal, he is procedurally barred from doing so now. If they were adequately raised, the doctrine of res judicata bars relitigation of the issues.

¶ 52 The Fifth Claim for Relief is denied.

Sixth Claim for Relief

¶ 53 Gollehon maintains that this Court should reconsider its rulings on issues Nos. 5 and 7 because at the time the case was decided, this Court was not properly constituted pursuant to §§ 3-2-101, 3-5-201, 3-1-1010 and -14, MCA, Article II, Sections 4, 13, 16, 17, 34, and Article VII, Section 3, of the Montana Constitution.

¶ 54 Gollehon contends that the substitution at oral argument of District Judge Lympus for Justice McDonough, violated the Montana Constitution because Justice McDonough suffered neither "disqualification" nor "disability" and merely failed to participate because of his retirement from the Court. Therefore, issues Nos. 5 and 7 of Gollehon's appeal were resolved in part by a judge who had no authority or jurisdiction to act. To the extent that the Court was lawfully constituted, issues Nos. 5 and 7 were resolved by an equally divided court.

Therefore, these issues should be determined by the present lawfully constituted Court. The Petitioner asserts that since this is a matter of jurisdiction of this Court, the issued can be raised at any time. *See* § 46-13-101(3), MCA.

¶ 55 Gollehon was aware of the substitution of Judge Lympus prior to oral argument, yet failed to raise this issue at oral argument or in his Petition for Rehearing. Postconviction relief is not available upon claims that a petitioner could have raised on direct appeal. We further note that § 46-21-105(2), MCA, contains no exception to the application of the procedural bar for issues related to "jurisdiction." Also, § 46-13-101(1), MCA, relates to objections which are required to be made pretrial, and therefore is not relevant here.

¶ 56 The Sixth Claim for Relief is denied. Therefore,

¶ 57 IT IS HEREBY ORDERED that the Amended Petition for Postconviction Relief is denied.

¶ 58 The Clerk of Court is directed to mail a true and correct copy of this order to all parties of record.

¶ 59 DATED this 9th day of September, 1999.

J.A. TURNAGE, C.J., JIM REGNIER, JAMES C. NELSON, WILLIAM E. HUNT, SR., W. WILLIAM LEAPHART, KARLA M. GRAY and TERRY N. TRIEWEILER, JJ., concur.

STATE of Montana, Plaintiff and Respondent,

v.

William GOLLEHON, Defendant and Appellant.

No. 95-316.

Supreme Court of Montana.
Submitted on Briefs Nov. 16, 1995.
Decided Nov. 30, 1995.
Rehearing Denied Dec. 21, 1995.

Michael Donahoe, Assistant Federal Defender, Helena, for Appellant.

Joseph P. Mazurek, Attorney General, Jennifer Anders, Pamela Collins, Assistant Attorneys General, Helena; Christopher Miller, Powell County Attorney, Deer Lodge, for Respondent.

NELSON, Justice.

William Gollehon (Gollehon) was convicted of deliberate homicide by accountability and sentenced to death. He appeals from an order of the District Court denying his motion for a new trial and request for discovery. We affirm the trial court's denial of Gollehon's motion for new trial; we do not address the trial court's ruling on his request for discovery.

Gollehon raises on appeal the issue of whether the State failed to timely disclose information that he could have used as mitigating evidence at his sentencing hearing and whether that failure justifies reversal of the death sentence that was imposed in his case.

We restate the issue as whether Gollehon's raising this issue in the context of an untimely motion for new trial bars our consideration of the merits of his claim. We hold that it does.

BACKGROUND

In October 1991, Gollehon was convicted of deliberate homicide by accountability and sentenced to death for his participation in the beating death of fellow prison inmate, Gerald Pileggi. This Court upheld that conviction and sentence in *State v. Gollehon* (1993), 262 Mont. 1, 864 P.2d 249.

On March 11, 1994, Gollehon petitioned the United States Supreme Court for certiorari. That Court declined to accept Gollehon's case for review in an order published October 3, 1994. *Gollehon v. Montana* (1994), ___ U.S. ___, 115 S.Ct. 95, 130 L.Ed.2d 45.

The State then moved the District Court for a hearing to reset Gollehon's execution date since the previous execution date had expired during the direct appeal process. At the March 24, 1995 hearing, Gollehon moved the District Court for an order requiring the State to produce any pretrial or posttrial promises or agreements with two eyewitnesses who testified at Gollehon's trial. Gollehon argued that this information, had it been disclosed, could have been used as impeachment evidence at trial.

The District Court granted Gollehon's request for discovery of pretrial agreements between the State and the eyewitnesses and ordered further briefing on the issue of whether Gollehon was entitled to any posttrial

agreements. The District Court reset Gollehon's execution for June 11, 1995.

On March 29, 1995, Gollehon moved for a new trial and a stay of execution. The State responded that the motion for new trial was untimely and should be summarily dismissed on that basis.

The District Court held a hearing on Gollehon's motions on June 7, 1995, just four days prior to Gollehon's scheduled execution date. At the hearing, the court determined that Gollehon's motion for a new trial was untimely. In addition, the court denied Gollehon's request for discovery of the State's posttrial arrangements with the witnesses, finding that any evidence regarding posttrial agreements would be irrelevant at sentencing as it was not the court's function to reweigh the jury's determination of witness credibility in a capital sentencing proceeding.

Gollehon appeals the order of the District Court denying his motion for a new trial and his request for discovery. Because of the proximity of Gollehon's execution date, the District Court issued a stay of execution pending Gollehon's appeal.

DISCUSSION

Gollehon maintains that his appeal "concerns the State's duty to disclose material information that would have aided [him] in convincing this Court that the balance of aggravating and mitigating factors demanded the imposition of a non-death sentence." Gollehon argues

that the State violated its obligations under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and under 46-15-322(1)(e), MCA, in failing to disclose the 1992 commutation of the sentence of State's witness Armstrong and his 1993 parole. Armstrong was one of the eyewitnesses who testified against Gollehon at his homicide trial.

We decline to reach the merits of Gollehon's *Brady* claim, however, in the procedural context in which the claim is raised. Specifically, Gollehon is appealing from the District Court's denial of his out-of-time motion for new trial. While Gollehon focuses on his substantive *Brady* claim, our initial inquiry is whether his claim, brought in the context of an untimely motion for new trial, should even be entertained. We conclude that it should not.

Section 46-16-702(2), MCA, provides that a motion for a new trial "must be filed by the defendant within 30 days following a verdict or finding of guilty. . . . " There is no provision in the statute for extending that time period. Gollehon's time for filing his new trial motion expired November 7, 1991, 30 days from entry of the verdict on October 7, 1991. Accordingly, his new trial motion, filed some three and one-half years after the entry of the verdict, is clearly untimely.

While Gollehon relies on past decisions of this Court (two of which were written by the author of this opinion) to avoid the plain and unambiguous requirements of the statute and to reach the merits, we are now persuaded that we originally started down this shaky staircase in error and that our judicially created exceptions to the

statute are fast becoming the rule. With that premise in mind, it is appropriate to re-examine our prior decisions.

State v. Best (1972), 161 Mont. 20, 503 P.2d 997, is cited as the seminal authority for the argument that evidence newly discovered posttrial provides an exception to the 30-day filing requirement for a new trial motion under our present statutory scheme. In that case the defendant filed in this Court his new trial motion during the pendency of his direct appeal. We noted that the motion was both untimely and filed in the wrong court under § 95-2101, RCM (1947), the predecessor to § 46-16-702, MCA. *Best*, 503 P.2d at 1000. In that conclusion we were correct, and we should have simply refused to entertain the defendant's motion on that basis. We needlessly went further, however.

In dicta, citing *State v. Nicks* (1957), 131 Mont. 567, 312 P.2d 519, we stated that,

> [i]f the grounds for seeking a new trial do not arise until after expiration of the 30 day period or until after the appeal is filed, the proper procedure is to stay the appeal, remand the case to the district court, file the motion, secure the district court's decision thereon, and continue with the appeal.

Best, 503 P.2d at 1001.

Unfortunately, under § 95-2101, RCM (1947) – the new trial statute in effect when we decided *Best* – *Nicks* was not authority either for the referred to "procedure" or for an exception to the 30-day filing requirement. Rather, *Nicks* involved § 94-7604, RCM (1947), which was repealed in 1967 and § 95-2101, RCM (1947), was adopted.

Section 94-7604, RCM (1947), allowed a new trial motion to be filed "within thirty days after the discovery of the facts upon which the party relies in support of his motion [and] in all other cases . . . within ten days after the rendition of the verdict." Section 94-7604, RCM (1947); *Nicks*, 312 P.2d at 520.

While we reached the right result in *Best*, we erred in stating that we lacked jurisdiction to entertain the new trial motion at issue there because of the defendant's "failure to follow [the *Nicks*] procedure." *Best*, 503 P.2d at 1001. While that procedure may have been available to *Nicks* under the statute governing his case, it was not available to *Best* under the different statute applicable in that case. The result in *Best* was correct because the defendant's motion for new trial was not timely filed – not for the reason we articulated.

In *State v. Perry* (1988), 232 Mont. 455, 758 P.2d 268, the defendant filed a motion for new trial following the recantation of the State's eyewitness some 15 years after Perry's murder conviction. *Perry*, 758 P.2d at 269-70. We rejected the State's argument that the motion, though denoted a motion for new trial, was actually a petition for post-conviction relief which was procedurally barred pursuant to the five year statute of limitations imposed by § 46-21-102, MCA. *Perry*, 758 P.2d at 272. Moreover, we declined to treat *Perry*'s motion as a petition for writ of *habeas corpus*, although we noted that his claim, nevertheless, sounded in the nature of that relief. *Perry*, 758 P.2d at 273. With no statutory posttrial remedies available, we finally concluded that we must, nevertheless, reach the merits of *Perry*'s claim because he had no other avenue of relief and that to deprive him of a method of redress

regardless of his diligence or the justness of his claim would be inconsistent with the intent of the legislature and with Art. II, sec. 17, of Montana's 1972 Constitution. *Perry*, 758 P.2d at 272-73.

Perry is unique on its facts. That case does not stand for the general proposition that a motion for new trial may be entertained beyond the 30-day filing requirement of § 46-16-702, MCA, and it is a misapplication of our decision in that case to argue that its analysis should be extended beyond other cases with like facts.

State v. Redcrow (1990), 242 Mont. 254, 790 P.2d 449, involved the defendant's motion for new trial filed approximately two months following her conviction of deliberate homicide. *Redcrow*, 790 P.2d at 451. The district court, while noting the untimeliness of *Redcrow*'s motion in its order, nevertheless ruled on the merits of her motion because it was filed "within a reasonable period of time" after the verdict and "because of the serious nature of the offense." *Redcrow*, 790 P.2d at 452. Citing *Best*, we acknowledged the 30-day time limit imposed by the statute and noted that the factors considered by the trial court did not *require* that it entertain *Redcrow*'s motion. Nonetheless, we addressed the merits of *Redcrow*'s claim because "of the extensive consideration of the motion by the District Court." *Redcrow*, 790 P.2d at 452.

Similarly, in *State v. Moore* (1994), 268 Mont. 20, 885 P.2d 457, in an opinion written by the author of this opinion, we cited *Redcrow* as precedent and followed its rationale – i.e., motion filed within a reasonable time after verdict; extensive consideration of the out-of-time motion

for new trial by the district court; and seriousness of the case – in reaching the merits of *Moore*'s motion for new trial, filed approximately two months following his conviction of deliberate homicide. *Moore*, 885 P.2d at 464, 479, 480-81.

In *Redcrow* we improperly reached the merits of the defendant's untimely motion for new trial notwithstanding that the trial court gave "extensive consideration" to the motion. There are no "reasonable time" or "serious case" exceptions to the 30-day filing requirement under § 46-16-702, MCA, and, as we pointed out in both *Redcrow* and *Moore*, those factors do not *require* the district court to entertain an out-of-time motion for new trial. *Redcrow*, 790 P.2d at 452; *Moore*, 885 P.2d at 480-81; § 46-16-702, MCA.

Unfortunately, in *Redcrow*, by judicial fiat, we created those exceptions from whole cloth for the purpose of reaching the merits. Moreover, as pointed out above, *Best* was not properly cited as authority for an exception to the 30-day filing requirement because the statement in that case supporting that argument was dicta, and flawed dicta, at that. Finally, neither the problem addressed in *Perry* nor that addressed in *State v. Barrack* (1994), 267 Mont. 154, 882 P.2d 1028, (discussed below), were at issue in *Redcrow*.

Likewise, *Moore* suffers from the same deficits, and we were wrong to rely on *Redcrow* as precedent for reaching the merits of the new trial issue. *Moore*'s untimely motion for new trial should have simply been denied on the basis of the procedural bar.

Finally, it is necessary to discuss our resolution of the out-of-time motion for new trial issue in *Barrack*, the other decision written by the author of this opinion. Like *Perry*, the circumstances of that case are unique. *Barrack*, 882 P.2d at 1032. In *Barrack*, the defendant was convicted of aggravated assault on June 30, 1992, and his first motion for new trial was heard and sentence was pronounced on August 5, 1992. Final judgment was filed August 21, 1992. *Barrack*, 882 P.2d at 1030. *Barrack* filed a second motion for new trial on August 26, 1992. *Barrack*, 882 P.2d at 1031. At a posttrial hearing on October 14, 1992, the trial court determined to treat *Barrack*'s out-of-time motion as a petition for post-conviction relief under a writ of coram nobis pursuant to § 46-21-101(1), MCA. Ultimately, after a hearing in December 1992, the district court denied the defendant's motion (petition) on the merits. *Barrack*, 882 P.2d at 1031.

Citing § 46-16-702, MCA, the State argued that *Barrack*'s motion was untimely and that it was improper for the trial court to treat the motion as one for post-conviction relief. We agreed. *Barrack*, 882 P.2d at 1031-32. Nevertheless, we noted that *Barrack* had a right to appeal his conviction and that his appeal time had expired on October 21, 1992. Importantly, we concluded that the trial court erred when, on October 14, 1992, it determined to treat *Barrack*'s untimely motion for new trial as one for post-conviction relief, with the result that the court "may have effectively curtailed any attempt *Barrack* may have made to appeal within the remaining statutory time. . . . [And, thus] possibly lulled the defendant into a position where he did not timely pursue his appeal rights. . . . " *Barrack*, 882 P.2d at 1032.

It was for that reason only that we determined to address the district court's decision on the merits of *Barrack*'s untimely motion. Notwithstanding, as we noted in concluding our analysis:

> [W]e wish to emphasize, however, that our decision here is not in any way to be read as enlarging the scope of post-conviction relief *or as diminishing a defendant's obligation to timely file a motion for a new trial* and a petition for post-conviction relief or appeal in accordance with the applicable statutes. [Emphasis added.]

Barrack, 882 P.2d at 1032.

Given the above case analyses, we hold that neither *Best*, *Redcrow* nor *Moore*, should henceforth be cited as authority for the proposition that either this Court or the district court may entertain a motion for new trial not timely filed in accordance with § 46-16-702, MCA. Furthermore, as to the new trial issue, we remain convinced that Perry and *Barrack* were correctly decided given their unique facts and procedural circumstances, and we reaffirm our decisions in those cases. We leave those cases – limited to their facts – standing as two judicially created exceptions to § 46-16-702, MCA, solely because the constitutional due process implications in each transcend the otherwise clear and unambiguous requirements of the statute.

With that frame of reference in mind, we hold that Gollehon's motion for new trial, filed three and one-half years post-verdict, is barred as being not timely filed and that neither the *Perry* nor the *Barrack* exceptions are applicable in the instant case. Unlike *Barrack*, Gollehon has had a direct appeal of his case, and he has not been lulled into

the waiver of any posttrial remedy through error of the trial court. Unlike *Perry*, Gollehon has the vehicle to raise his post-verdict claims through a petition for post-conviction relief. He may still timely file such a petition under § 46-21-101, MCA; to date, he has simply *chosen* not to do so.

Accordingly, while we affirm the District Court's denial of Gollehon's motion for new trial as being time-barred, we decline to address the merits of the defendant's *Brady* claim brought in the context of his untimely new trial motion.

TURNAGE, C.J., and GRAY, ERDMANN, HUNT, LEAPHART and TRIEWEILER, JJ., concur.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

October 3, 1994

Ms. Jennifer Anders
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

Re: William Gollehon
v. Montana
No. 93-8286

Dear Ms. Anders:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

STATE of Montana, Plaintiff and Respondent,

v.

William GOLLEHON, Defendant and Appellant.

Nos. 92-156, 92-231.

Supreme Court of Montana.
Submitted May 26, 1993.
Decided Oct. 20, 1993.
Order Denying Rehearing Dec. 14, 1993.

Michael Donahoe and Mark Yeshe, Helena, for defendant and appellant.

Joseph P. Mazurek, Atty. Gen., Jennifer Anders, Asst., Helena, Christopher G. Miller, Powell County Atty., Deer Lodge, John P. Connor, Asst. Atty. Gen. and Sp. Deputy Powell County Atty., Helena, for plaintiff and respondent.

WEBER, Justice.

This is an appeal from a verdict and sentence from the Third Judicial District Court, Powell County, finding Gollehon guilty of deliberate homicide by accountability and sentencing him to death. We affirm.

We consider the following issues on appeal:

1. Did the District Court err by allowing State's counsel and co-defendant Turner's counsel to question prospective jurors during voir dire about the possibility of the death penalty being imposed (known as "death qualification")?

2. Did the District Court abuse its discretion by refusing to dismiss or continue the trial

because of an alleged discovery violation by the State?

3. Did the District Court abuse its discretion in refusing to allow Gollehon to inquire into evidence of prior crimes committed by one of the State's eyewitnesses?

4. Did the District Court err in denying Gollehon's motion to declare Montana's death legislation illegal and unconstitutional?

5. Did the District Court err by failing to rule, as a matter of law, that no aggravating circumstances existed?

6. Did the District Court err by failing to rule, as a matter of law, that mitigating factors existed and that such mitigating factors were substantial enough to call for leniency?

7. Did the District Court err by sentencing Gollehon to death for the crime of deliberate homicide by accountability?

8. Did the District Court properly refuse to consider Gollehon's argument that death by hanging constitutes cruel and unusual punishment?

9. Should this Court uphold Gollehon's death sentence on automatic review?

While the opinion in *State v. Turner*, 864 P.2d 235 sets out the facts of the homicide at issue with great detail, we briefly summarize the events of September 2, 1990. Corrections officers Larry Spangberg and Karl Beckerleg were making a routine walk around the track in the exercise yard of the Montana State Prison. A softball game was in progress. As they walked the track which

circled the baseball diamond, the officers noticed the players had begun to drift to the side of the yard. As they approached the backstop, they found the badly beaten body of Gerald Pileggi. Two baseball bats lay by his body.

Inmates have exercise time from 1 p.m. to 2:15 p.m. and from 2:15 p.m. to 3:45 p.m. Once in the exercise yard, inmates must stay there until the period is over. At the time of the beating, 250 inmates were in the exercise yard, including prison inmates from the high security section of the prison, known as the "highside." After officers found Pileggi, the yard was "called in" and inmates were searched. Nothing suspicious was found.

Medical personnel were dispatched to the yard. Pileggi was still alive when taken from the yard but was having trouble breathing because of all the blood in his throat. The prison nurse was unable to recognize that the prisoner was Pileggi. Pileggi died while being air-lifted to St. Patrick's hospital in Missoula.

An autopsy performed by Dr. Gary Dale, a State Medical Examiner, revealed that Pileggi had died of multiple injuries to the head and trunk. Dr. Dale was able to identify at least four blows, including a massive blow to the top of the head which caused the skull to cave in and a major blow to the left side of the face which collapsed the left side of the forehead and caused the brain to tear and the eyeball to rupture. Also identified were a blow to the jaw which fractured the upper and lower jaws, a blow to the breastbone, and another to the shoulder. Pileggi's arms had bruises which indicated a struggle had taken place.

The blows to the brain were identified as fatal because they tore the brain. Dr. Dale testified that most of the blows could have been delivered while Pileggi was standing but the blow to the left side of the head was delivered while Pileggi was on the ground. The blow to the left side of the skull collapsed the skull and pulpified the brain.

Following the beating, Pileggi's cell was searched and a calendar containing notations was discovered. Because of this calendar, the investigation centered on three inmates: Douglas Turner, William Gollehon and Daryl Daniels. The notations on the calendar documented confrontations with these individuals, all of whom worked in the "highside" kitchen before they were terminated because of suspected assaults on other inmates.

Correction officials describe an increasing tension in the month before Pileggi's death between kitchen employees who were non-sex offenders and those who were sex-offenders. Of the sex-offenders, several, including Pileggi, were physically beaten by other kitchen inmate employees. The victims would not reveal who was responsible for the injuries.

Pileggi told corrections officers that three inmates had dragged him into the dish room in the kitchen and beat him up, but refused to identify who the three were. Gollehon, Turner and Daniels worked in the dish room. After this incident, the three were removed from the staff, just days before Pileggi's death.

Because of the above incidents and Pileggi's calendar notes, Gollehon, Turner and Daniels were removed from their cells and their cells were searched. In Gollehon's

cell, officials found a pair of prison pants, with blood on them, and a towel stuffed into a pillow case. The bottoms of the pant legs had been ripped off and officers could see blood spatters on the remaining part of the pants. The towel also had blood on it. A forensic serologist was unable to verify that the blood was Pileggi's.

Gollehon, Turner and Daniels were placed in maximum security. A number of inmates were interviewed but no one would give the names of those responsible for the beating death of Pileggi, despite the large number of inmates in the yard when Pileggi was murdered. In January 1991, an eyewitness came forward and agreed to testify in exchange for his guaranteed safety. This led to the filing of charges against Gollehon and Turner.

The inmate, J.D. Armstrong, testified that he was playing baseball in the exercise yard the day Pileggi was beaten. Armstrong testified that he was approached by Gollehon who asked him which baseball bat was used the least. Armstrong testified that he suspected Gollehon was going to start a fight with Pileggi because Gollehon had indicated that he was going to "mess him up." Armstrong also testified that he saw Gollehon confront Pileggi with a baseball bat as Pileggi came around the track to the baseball field backstop.

Armstrong noted that the two struggled for control of the bat just prior to Turner's arrival at the scene. Armstrong saw Turner hit Pileggi on the left side of his face, after which Pileggi fell to the ground. Armstrong testified he then saw Turner and Gollehon each deliver four or five more blows before throwing the bats onto Pileggi's body.

Armstrong testified that as soon as the other inmates realized what was happening they quickly left the baseball diamond. Armstrong told Gollehon afterwards that he should do something about his pants because they were blood spattered. Gollehon responded with profanity, according to Armstrong.

Another inmate, William Arnot, corroborated Armstrong's testimony. He further testified that he did not see Daryl Daniels in the exercise yard on that day.

A defense witness testified that nine or ten inmates were involved and that after they pulled away, he saw a man lying on the ground. He testified he could not recognize any of the inmates. Other witnesses testified that they were playing with, or had seen, Gollehon and Turner playing horseshoes at the time of the beating. Another witness testified that Armstrong was not on the softball field the day of Pileggi's death but was playing dominoes with him in the gym.

On January 10, 1991, an information was filed in Powell County District Court charging Gollehon and Turner with deliberate homicide for the beating death of Pileggi. On May 17, 1991, the information was amended to charge the defendants jointly with deliberate homicide or, in the alternative with deliberate homicide by accountability. Prior to trial the State gave notice to defendants that it would seek the death penalty in the event of a conviction. Following a joint trial, the jury found each defendant guilty of deliberate homicide by accountability.

A separate sentencing hearing was held for Gollehon on February 27, 1992. The District Court determined that

leniency was not warranted because the mitigating factors did not sufficiently outweigh the aggravating circumstances. On March 19, 1992, Gollehon was sentenced to death by hanging because he had not exercised his option to choose death by lethal injection. Gollehon appealed and the District Court stayed Gollehon's execution pending resolution of this appeal. While Turner presents us with only three issues on appeal, Gollehon puts forth nine issues for resolution.

I.

Did the District Court err by allowing State's counsel and co-defendant Turner's counsel to question prospective jurors during voir dire about the possibility of the death penalty being imposed (known as "death qualification")?

Before voir dire began, Gollehon made an oral motion in limine requesting the court to prohibit the State from asking jury panel members to declare their beliefs concerning the death penalty. Gollehon's argument was that Montana juries do not participate in the sentencing portion of trial and, therefore, questioning the members about a possible sentence was inappropriate. Gollehon further argued that social science evidence proves that when a jury is "death qualified" it is more prone to convict the defendant.

The judge took the motion under advisement and asked co-defendant Turner to respond to his stance on the issue. Turner responded that he felt the jury should be death qualified. Gollehon then moved the court to sever his trial from Turner. The court denied the motion.

Gollehon claims that under Montana law, if the jury panel knows that the death penalty could be imposed upon conviction, the error is prejudicial per se. Further, Gollehon argues that the process of death qualification results in juries that are more conviction prone and that represent certain identifiable groups in society. According to Gollehon, such questioning of jurors and the resulting challenges for cause by attorneys produce unrepresentative juries and violate his constitutional rights of due process under both the state and federal constitutions. Gollehon, therefore, seeks a reversal of his conviction and a new trial.

Gollehon has presented a constitutional challenge pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution concerning the trial court's questioning of jurors during voir dire to determine their views on the death penalty (death qualification). The State argues that Montana law specifically provides for death qualification of juries pursuant to § 46-16-115(2)(h), MCA, which provides:

> (2) A challenge for cause may be taken for all or any of the following reasons . . . (h) if the offense charged is punishable with death, having any conscientious opinions concerning the punishment as would preclude finding the defendant guilty, in which case the person must neither be permitted nor compelled to serve as a juror;

According to the State, jurors cannot be dismissed simply because they have doubts about the death penalty but only if their beliefs for or against such penalty would

prevent or impair their performance as a juror. This statute follows guidelines laid out by the Supreme Court of the United States in *Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, and further defined by *Wainwright v. Witt* (1985), 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841. In *Witherspoon*, the United States Supreme Court ruled that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excluding prospective jurors for cause simply because they voiced *general* objections to the death penalty. *State v. Coleman* (1978), 177 Mont. 1, 579 P.2d 732. *Witherspoon* provided an exception to this rule: if a prospective juror is irrevocably committed to voting against conviction because of the possibility of a death penalty, he may be excused for cause.

Montana codifies the *Witherspoon* rule in § 46-16-115(2)(h), MCA. Our statute permits a juror to be excused not for his or her mere belief or disbelief in the use of the death penalty, but only in instances where that belief prohibits the juror from applying the law which the judge has provided.

> The death qualifying voir dire is, thus, more extensive than a mere inquiry into the venireperson's views on the death penalty . . . [it is] "deep probing as to the opinions held" including exploration of whether the venirepersons can consider the full range of punishment under the facts alleged in the case before them. . . . This qualification is a two-step process. First, the experiences, opinions or views of the venireperson are uncovered by questions asked by the court and attorneys. Second, a determination is made by the trial court as to

> whether those experiences, opinions or views will prevent or substantially impair the person's duties as a juror in accordance with the instructions and oath.

P. Peters, *Capital Voir Dire: A Procedure Gone Awry*, 58 UMCK Law Review, 603, 623 (1990).

Gollehon presents us with social science studies which seem to indicate that death-qualifying a jury prejudices a defendant. We note that the U.S. Supreme Court has considered studies such as these and rejected them. In fact, we note that one of the authorities cited by Gollehon in support was used in *Lockhart v. McCree* (1986), 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137, and rejected by the U.S. Supreme Court.

In *Lockhart*, the Supreme Court seriously questioned the validity of such studies. *See* M. Peters, *Constitutional Law: Does "Death Qualification" Spell Death for Capital Defendant's Constitutional Right to an Impartial Jury*? 26 Washburn Law Journal, 382, 394 (1987). McCree argued the same thing that Gollehon argues here that "death qualification" violated the fair cross section requirement of the Sixth Amendment and violated his due process rights. The U.S. Supreme Court disagreed, holding that defendant was entitled to a fair cross section of the jury *panel* and not the final jury selected. *Lockhart*, 476 U.S. at 174, 106 S.Ct. at 1764, 90 L.Ed.2d at 148. We agree with the Court's assessment that to have a cross-section of the jury would require a Herculean effort and be "unworkable and unsound." *Lockhart*, 476 U.S. at 174, 106 S.Ct. at 1765, 90 L.Ed.2d at 148.

Gollehon's due process arguments are likewise without substance. In *Lockhart* the U.S. Supreme Court considered the studies individually and expressly ruled that even if valid, the studies did not prove death qualification was unconstitutional. Like the U.S. Supreme Court and Montana, many jurisdictions in this country have determined that death qualification is constitutional and does not infringe upon the accused's due process rights. *Johnson v. State* (Fla.1992), 608 So.2d 4; *Pickens v. Lockhart* (E.D.Ark.1992), 802 F.Supp. 208; *Clayton v. State* (Okl.Cr.App.1992), 840 P.2d 18; *People v. Hill* (1992), 3 Cal.4th 959, 13 Cal.Rptr.2d 475, 839 P.2d 984 and *State v. Harris* (1992), 839 S.W.2d 54. One state has determined that a defendant who wished to engage in death qualification of the jury and was prohibited by the court from so doing was denied due process of law. *People v. Smith* (1992), 152 Ill.2d 229, 178 Ill.Dec. 335, 604 N.E.2d 858.

Gollehon's statement that any mention of death as a penalty is prejudicial per se in Montana is incorrect. He cites *State v. Herrera* (1982), 197 Mont. 462, 643 P.2d 588 and *State v. Brodniak* (1986), 221 Mont. 212, 718 P.2d 322. Neither case is a capital case nor even hints at such a pronouncement on death qualification.

While Gollehon's point concerning the bifurcation of the guilt and sentencing portions of Montana trials is noted, we do not conclude that such division automatically precludes the death qualification process. Every defendant is entitled to a jury that will follow the court's instructions and act impartially. If a juror, despite the instructions by the court, will refuse to consider conviction because of his or her strong belief concerning the

possible death sentence, the juror's dismissal is appropriate. *Adams v. Texas* (1980), 448 U.S. 38, 50, 100 S.Ct. 2521, 2529, 65 L.Ed.2d 581, 593.

Here the court and counsel questioned the jury panel adequately. The judge excused one panel member because she could not assure the court that she would be able to follow the court's instructions during trial because of her strong stance against the death penalty. Such exclusion is proper according to § 46-16-115(2)(h), MCA.

We conclude that the greater weight of authority indicates that death qualification as a procedure to insure a jury committed to its task is constitutional. We, therefore, hold that the District Court did not err by allowing the State's counsel and co-defendant Turner's counsel to question prospective jury members during voir dire about the possibility of the death penalty.

II

Did the District Court err by refusing to dismiss or continue the trial because of an alleged discovery violation by the State?

Gollehon claims he learned of a possible discovery violation during the course of the trial. He then moved the court for dismissal or in the alternative for a continuance. Both motions were denied.

Gollehon argues on appeal that Powell County Undersheriff Scott Howard (Howard) interviewed hundreds of inmates concerning Pileggi's death. According to Gollehon not all of these interviews had ensuing reports; nor were contents of interviews containing information

inconsistent with the physical evidence released to the defense. Gollehon argues that the circumstances attendant to Pileggi's murder were common knowledge throughout the prison. Therefore, Gollehon argues that information withheld from him could have been significant in discrediting the State's two alleged eyewitnesses. According to Gollehon, the State had a legal obligation to provide him with the information gleaned from these interviews.

The State contends that six months prior to trial it sent Gollehon a list of file materials in its possession, one of these files was a list of inmates questioned and a list of inmates interviewed by Howard and Tom Blaz, deputy investigator at the Montana State Prison. Further, the State filed its notice of disclosure pursuant to § 46-15-322, MCA. The State further argues that Gollehon's motion to dismiss came long after he supposedly became aware of the alleged violation. The State argues that none of the inmates interviewed implicated anyone other than Gollehon and Turner. Therefore, the State claims that the untimely objection combined with Gollehon's lack of proof that the information not presented to him could have been material, casts serious doubt on the legitimacy of Gollehon's claimed discovery violation.

Gollehon's motion to dismiss is in effect a motion requesting the court to exercise its discretion to dismiss the charges on its own and in the furtherance of justice. Section 46-13-401, MCA (formerly 46-13-201, MCA). *See State v. Roll* (1983), 206 Mont. 259, 670 P.2d 566. This Court will review a district court's decision to dismiss criminal charges by determining whether the lower court abused its discretion in view of the constitutional rights

of the defendant and the interest of society. Roll, 206 Mont. at 261, 670 P.2d at 568. A motion for a continuance is reviewed for abuse of discretion. *State v. LaPier* (1990), 242 Mont. 335, 790 P.2d 983; § 46-13-202(3), MCA.

The pivotal concern here is whether the State failed to provide the defense with pertinent, exculpatory evidence. Suppression of evidence by the State of facts that would be favorable to the defendant constitutes a violation of defendant's due process rights. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. This evidence, known as "Brady Material," must be intentionally or deliberately suppressed by the investigating officers in order for the act of suppression to be a due process violation per se. *Sadowski v. McCormick* (1991), 247 Mont. 63, 805 P.2d 537.

Negligently suppressed evidence violates due process only if it is material and of substantial use, vital to defense, and exculpatory. *Sadowski*, 247 Mont. at 79, 805 P.2d at 547. Officials investigating this murder had no duty to obtain exculpatory evidence favorable to the defense, but must avoid interference with the efforts on the part of the accused to obtain such evidence. *Sadowski*, 247 Mont. at 79, 805 P.2d at 546.

Investigators for the State provided the defense with lists containing 213 pieces of evidence it had gathered in the case. Number 71 on the list is noted as:

> 1 page list of inmates interviewed by Deputy Howard and Tom Blaz.

Number 103 on that list states:

> 1 page list of inmates questioned, dated 9-2-90.

It was up to Gollehon to request these items:

> **Disclosure by prosecution.** (1) *Upon request,* the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control . . . (Emphasis added.)

Section 46-15-322(1), MCA. The record does not indicate such a request was made.

More importantly, nothing prevented Gollehon from questioning anyone at the prison. The State was under a duty to provide statements from inmates it planned to use as witnesses. Section 46-15-322(1)(a), MCA. The State was not under a duty to investigate the entire case for Gollehon.

Gollehon states "it is fair to speculate that at least some of the information garnered from these other witnesses was accurate." This Court will not sanction such "speculation." Gollehon was free to question inmates and put them on the stand. He chose not to do that. Having made the decision, he cannot now claim a discovery abuse. Of paramount importance is the fact Gollehon provides no evidence whatsoever that any exculpatory evidence would have been obtained. Speculation of exculpatory evidence is not enough to show it to be "of substantial use" or "vital to the defense."

We conclude that the State met its responsibility in providing Gollehon with a list of its evidence. Therefore, we hold the District Court did not abuse its discretion in denying dismissal or a continuance.

III

Did the District Court abuse its discretion in refusing to allow Gollehon to inquire into evidence of prior crimes committed by one of the State's eyewitnesses?

The State offered testimony of two inmates who stated they witnessed the beating death of Gerald Pileggi: J.D. Armstrong and William Arnot. Gollehon sought the court's permission to introduce a past employer of Arnot's who would testify that Arnot stole his Mercedes. Also, Gollehon wished to present evidence of other thefts and burglaries committed by Arnot. The court refused to allow any questions concerning prior acts of theft or burglary, citing Rules 608 and 609, M.R.Evid.

Gollehon argues that the rules of evidence permit him to introduce evidence of a witness's prior bad acts which go to prove the witness's dishonesty. The State contends that at a pretrial hearing all parties agreed to abide by the Montana Rules of Evidence and those rules specifically exclude the use of prior convictions to impeach a witness.

This issue involves Montana Rules of Evidence 608 and 609:

> **Rule 608. Evidence of character and conduct of witness.**
>
> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible

only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by evidence of conviction of crime.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.

Rule 608(b), M.R.Evid., provides that specific instances of conduct by a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. *State v. Norris* (1984), 212 Mont. 427, 689 P.2d 243. The record reveals that Gollehon's attorney wished to question both a prior employer and Arnot himself on cross-examination concerning past acts

of burglary and theft. The court correctly refused such questioning.

Rule 608 permits "opinion" testimony concerning truthfulness in order to support or discredit testimony. Gollehon did not attempt to introduce such opinion testimony. The proposed testimony of Arnot's past employer indicating Arnot's theft of the employer's Mercedes constitutes extrinsic evidence of conduct used for the purpose of discrediting a witness and as such is prohibited by Rule 608(b), M.R.Evid.

Further, Gollehon's proposed questioning of Arnot on cross-examination as to his own prior acts of theft and burglary is likewise inadmissible. We previously held:

> The testimony as to Phillips' previous misconduct was wholly unrelated to the ability of Phillips to observe, recall or testify as to any relevant occurrences in the altercation between White and Pippin.

State v. White (1983), 202 Mont. 491, 496, 658 P.2d 1111, 1113. Likewise, testimony of previous instances of theft and burglary by Arnot was wholly unrelated to Arnot's truthfulness, ability to observe, recall or testify as to the beating of Pileggi by Gollehon.

Gollehon argues that he should have been able to question Arnot about incidents of theft and burglary because they go to the witness's "habit of doing things that impugned his ability to be credible and to tell the truth." Therefore, Gollehon argues that evidence concerning theft and burglary are admissible to prove truthfulness. Using this reasoning, any criminal act can be said

to do the same thing. Gollehon quotes a leading treatise on evidence which lists acts indicating dishonesty: forgery, bribery, suppression of evidence, false pretenses, cheating and embezzlement. J. Weinstein & M. Berger, *Weinstein's Evidence*, § 608[5], at 608-27 to 608-52 (1988 & Supp.1990). Burglary and theft are properly absent from this list, yet Gollehon argues that a source used by the authors of the treatise did contain theft and burglary. We decline to read these offenses into the treatise's list.

Gollehon's thinly-veiled proposed questioning of Arnot's prior convictions without mentioning the word "conviction" is not persuasive. Montana's Rule 609, M.R.Evid., is unique; it specifically prohibits evidence of a witness's prior convictions. This Court has been adamant in prior rulings that Rule 609 be strictly enforced:

> [T]he intention on the part of the State [in asking about prior convictions] was to discredit the witness by showing that he had been engaged in crimes of intimidation and assault, and that the intimidation crime involved guns. We further conclude that the aim on the part of the State was to improperly impugn the character of the defendant and thereby suggest a greater likelihood of guilt of the crimes with which he was charged. We will not tolerate this intentional and significant evasion of our rules.

State v. Shaw (1989), 237 Mont. 451, 454, 775 P.2d 207, 208-209.

Gollehon goes on to argue that elimination of this line of questioning worked to deny him his constitutional right of confrontation. The Sixth Amendment to the United States constitution guarantees the right of an

accused in a criminal prosecution "to be confronted with the witnesses against him." *State v. Short* (1985), 217 Mont. 62, 67, 702 P.2d 979, 982. This includes the right to cross-examination. *Davis v. Alaska* (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347.

The court must balance the probative value of relevant evidence as compared with the possibility of prejudice. *Short*, 217 Mont. at 69, 702 P.2d at 983. If the probative value of evidence is greater, and other evidentiary parameters are satisfied, the evidence is admissible.

Admission of evidence resides with the discretion of the court. *State v. Crist* (1992), 253 Mont. 442, 833 P.2d 1052. Once admitted, however, it is the trier of fact who must determine the weight to be given to each piece of evidence admitted. *State v. Bower* (1992), 254 Mont. 1, 833 P.2d 1106. Gollehon's argument that the trier of fact was not presented with a crucial line of questioning of Arnot is totally speculative.

> We hold that limiting the extent of the cross-examination on the pending charges in Washington did not violate Short's right to confrontation of witnesses and was not an abuse of the trial court's discretion.

Short, 217 Mont. at 68, 702 P.2d at 982.

Likewise, we conclude that Gollehon's right to confrontation was not denied by the court's restrictions on cross-examination of Arnot. We hold the District Court did not abuse its discretion by refusing to allow Gollehon to inquire into evidence of prior crimes committed by one of the State's eyewitnesses.

IV

Did the District Court err in denying Gollehon's motion to declare Montana's death legislation illegal and unconstitutional?

Gollehon argues that this Court should once again consider the constitutionality of Montana's death penalty legislation. Gollehon contends that the present legislative scheme denies him due process and equal protection under the Fourteenth Amendment to the United States Constitution. The State argues that this Court has already definitively determined that the death penalty statute is constitutional.

Gollehon argues that Montana's death penalty statutes violate Article II, Section 28 of Montana's Constitution which provides:

> Laws for the punishment of crime shall be founded on the principles of prevention and reformation. Full rights are restored by termination of state supervision for any offense against the State.

Gollehon argues, as have others before him, that the 1889 Constitution contained a reference to the death penalty and the conscious excision of any mention of this punishment indicates the legislature's unwillingness to use the death penalty. Such is clearly not the case.

The legislature has instituted the death penalty and retains it pursuant to § 46-18-301, MCA. If the legislature of this State intended to do away with the death penalty, it would have repealed this piece of legislation. Further, and more important, if as Gollehon claims, the vote of the

people of this State to retain the death penalty was somehow not representative, the people would have objected some time during the twenty-one years since the 1972 referendum.

The State's argument that this Court has previously determined the constitutionality of the death penalty is well taken. Both *State v. Langford* (1991), 248 Mont. 420, 813 P.2d 936 and *State v. McKenzie* (1976), 171 Mont. 278, 557 P.2d 1023, have upheld the constitutionality of our death penalty statutes:

> We therefore affirm our holding in *McKenzie* and hold that Montana's death penalty statutes do not violate Montana Constitution Article II, Section 28.

Langford, 248 Mont. at 441, 813 P.2d at 952.

We conclude that Gollehon has raised arguments the Court has considered in the past. We hold that the District Court did not err in denying Gollehon's motion to declare Montana's death legislation illegal and unconstitutional.

V

Did the District Court err by failing to rule, as a matter of law, that no aggravating circumstances existed?

Gollehon argues that the trial court improperly considered the aggravating circumstances as per § 46-18-303(1) and (2), MCA. Gollehon contends that both aggravating factors can only be applied if he was convicted of deliberate homicide and since he was acquitted of deliberate homicide, the aggravating factors do not

apply. Further, Gollehon argues that when the sentencing judge considered deliberate homicide he was in violation of the double jeopardy provisions of the Montana Constitution as well as the United States Constitution.

The State contends that Gollehon was convicted of accountability for deliberate homicide and his arguments reflect a misunderstanding of the jury's verdict and the applicable case law.

This presents a question of law which we review de novo. *U.S. v. Engesser* (9th Cir.Mont.1986), 788 F.2d 1401, *cert. denied*, 479 U.S. 869, 107 S.Ct. 233, 93 L.Ed.2d 159. The aggravating factors which are weighed when a court considers the death penalty are found in § 46-18-303, MCA. Here the court considered (1) and (2) as aggravating factors:

> (1) *The offense was deliberate homicide* and was committed by a person serving a sentence of imprisonment in the state prison.
>
> (2) *The offense was deliberate homicide* and was committed by a defendant who had been previously convicted of another deliberate homicide.
>
> (3) The offense was deliberate homicide and was committed by means of torture.
>
> (4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.
>
> (5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 45-5-102, and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim or the death by direct action of the defendant of a person who rescued or attempted to rescue the victim.

(8) The offense was attempted deliberate homicide, aggravated assault, or aggravated kidnapping committed while incarcerated at the state prison by a person who has been previously:

(a) convicted of the offense of deliberate homicide; or

(b) found to be a persistent felony offender pursuant to part 5 of this chapter and one of the convictions was for an offense against the person in violation of Title 45, chapter 5, for which the minimum prison term is not less than 2 years.

(9) The offense was deliberate homicide and was committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age. (Emphasis supplied.)

Section 46-18-303, MCA. Gollehon objects to subsection 1 and 2 as aggravating factors because he claims to have been acquitted of deliberate homicide.

The jury found Gollehon and Turner "not guilty" of deliberate homicide but "guilty" of deliberate homicide

by accountability. The jury was instructed that a person is legally accountable for the conduct of another when:

> (1) he purposely or knowingly causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; or
>
> (2) the statute defining the offense makes him so accountable; or
>
> (3) either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, he solicits, aids, abet, agrees or attempts to aid, such other person in the planning or commission of the offense.

Jury Instruction # 11.

The court went on to explain deliberate homicide by accountability:

> *To convict defendants, or either of them, of Deliberate Homicide by being legally accountable* for the conduct of another, the State must prove the following elements:
>
> 1. *That the crime of Deliberate Homicide,* as defined in Instruction 9 *has been committed;* and
>
> 2. That either or both of defendants, *with common purpose* with the other defendant, either before or *during the commission of the offense of deliberate homicide,* and with the purpose to promote or facilitate such commission solicits, aids, abets, agrees or attempts to aid, the other defendant in the planning or commission of the offense.

> If you find from your consideration of the evidence that all these elements have been proved beyond a reasonable doubt, then you should find the defendants, or either of them, guilty of Deliberate Homicide by Accountability, as alleged in Count II of the Information.
>
> If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the defendants, or either of them, not guilty of Deliberate Homicide by Accountability, as alleged in Count II of the Information. (Emphasis added.)

Jury Instruction # 12.

These instructions clearly and correctly instruct the jury that the offense of deliberate homicide by accountability requires a deliberate homicide and that the defendant(s) acted with common purpose before or during the homicide. The jury did not find Gollehon not guilty of deliberate homicide, but only found he did not act *alone* during the crime. A charge of deliberate homicide by accountability allowed the jury to convict both men involved in the deliberate homicide without having to make the determination of who struck the fatal blow.

Gollehon cites *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, for the proposition that the Eighth Amendment forbids the imposition of the death penalty against one who neither took life, attempted to take life, nor intended to take life. It is Gollehon's argument that he was acquitted of deliberate homicide and cannot be said to have attempted to take life.

In *Enmund*, the Supreme Court reversed a death sentence levied on the driver of a car involved in a robbery in which several people were killed. Two robbers who had entered the home committed the murders while Enmund waited in the car. The case we have before us is not a felony murder case like *Enmund*. Here, both Gollehon and Turner were convicted of deliberate homicide by accountability. Both Gollehon and Turner were adjudged to have acted in a common plan to kill Pileggi, regardless of who struck the fatal blow.

Gollehon's persistent view that he was acquitted of deliberate homicide is error. Gollehon was found not to have acted alone – he was convicted of acting with Turner in a common scheme to kill Pileggi.

Gollehon's argument that the crime of "accountability" is a separate crime is not correct. The State charged accountability for deliberate homicide so that the jury could convict if they determined Gollehon and Turner aided and abetted each other in the murder of Pileggi.

In *State v. Duncan* (1991), 247 Mont. 232, 805 P.2d 1387, the appellant following a conviction for deliberate homicide argued that the record did not contain sufficient evidence to prove that he shot and killed the victim.

> The evidence did not have to prove that Roy actually shot and killed Larry as Roy was charged and convicted of deliberate homicide through accountability . . . The record, through the testimony of Ursla, Sherry and Ginny, as well as other witnesses, overwhelmingly

> indicates that Roy either shot Larry, or aided or abetted Joe in doing so.

Duncan, 247 Mont. at 239, 805 P.2d at 1392.

Because the jury found that Gollehon was guilty of deliberate homicide by accountability the sentencing consideration of whether to use the death penalty for the conviction was not double jeopardy. The jury had already determined that Gollehon had committed deliberate homicide by, at the very least, aiding and abetting Turner. "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts . . . the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant . . . " *Walton v. Arizona* (1990), 497 U.S. 639, 648, 110 S.Ct. 3047, 3054, 111 L.Ed.2d 511, 525.

We hold that the District Court did not err in failing to rule, as a matter of law, that no aggravating circumstances existed.

VI

Did the District Court err by failing to rule, as a matter of law, that mitigating factors existed and that such mitigating factors were substantial enough to call for leniency?

Gollehon argues that the court is obliged to review the existence or nonexistence of all mitigating circumstances enumerated in § 46-18-304, MCA. Gollehon further argues that his extensive sexual abuse as a child entitled him to rehabilitation and the only programs in

existence within the prison system are provided for women abuse victims, not men. Therefore, Gollehon contends that the mitigating evidence he presented was substantial enough to call for leniency.

The State argues that the District Court considered the mitigating factors of § 46-18-304, MCA, and determined after giving all mitigating factors effect, that leniency was not called for. Further, the State argues that on appeal, Gollehon does not argue any of the specific mitigating factors to be considered under Montana law, but only factors which fall within the "catch all" category of the statute.

This Court is charged on review of a death sentence to consider the punishment as well as any errors enumerated by way of appeal according to § 46-18-310, MCA:

> (1) whether the sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor;
>
> (2) whether the evidence supports the judge's finding of the existence or nonexistence of the . . . mitigating circumstances enumerated in . . . 46-18-304, MCA; and
>
> (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

The District Court issued findings of fact and conclusions of law following a sentencing hearing on February

27, 1992. The findings in regard to mitigating circumstances were structured around the legislative directives of § 46-18-304, MCA:

> **46-18-304. Mitigating circumstances.** Mitigating circumstances are any of the following:
>
> (1) The defendant has no significant history of prior criminal activity.
>
> (2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (5) The victim was a participant in the defendant's conduct or consented to the act.
>
> (6) The defendant was an accomplice in an offense committed by another person, and his participation was relative minor.
>
> (7) The defendant, at the time of the commission of the crime, was less than 18 years of age.
>
> (8) Any other fact that exists in mitigation of the penalty.

The court reviewed the first seven elements in detail noting that no evidence had been submitted by Gollehon concerning elements one through seven. Gollehon presented evidence concerning subsection 8, the catch-all,

which vividly portrayed the inhuman conditions under which he was raised. He presents the same on appeal.

While we acknowledge the severity of Gollehon's traumatic childhood, our responsibility as a reviewing court is to evaluate whether the district court acted without passion or prejudice, under the existence or nonexistence of substantial evidence, and with consideration of whether the sentence given is proportionate to the crime. Section 46-18-310, MCA.

The District Court stated in finding # 14 that it had considered and given effect to all Gollehon's mitigating evidence of childhood abuse. The court considered in detail, and without passion or prejudice, the evidence presented by Gollehon. In the end, the court determined that Gollehon had failed to take advantage of any help for problems caused by his childhood abuse and that the evidence concerning his family history was not sufficient to preclude the death penalty.

The Ninth Circuit in reviewing Montana's catch-all subsection to § 46-18-304, MCA, states that as long as the court *considers* evidence presented under this subsection "[t]he Montana courts were entitled to conclude that the mitigating evidence . . . submitted under the catch all subsection 8 was not persuasive enough to grant a sentence less than death." *Smith v. McCormick* (9th Cir.Mont.1990), 914 F.2d 1153, 1165. The findings issued by the District Court clearly show that it cited many instances from Gollehon's past which indicate that he did not attempt to overcome the problems of his childhood abuse.

The court further considered elements from Gollehon's history of institutionalization as mitigating factors. The court stated that despite instances of prior good conduct during his first prison sentence, Gollehon's failure to address his serious personality problems led to even more serious difficulties during his second incarceration, this time for deliberate homicide. The court concluded:

> The defendant has demonstrated that he cannot live within the rules of even a prison society without taking another life. The court feels that he will again kill another human being if the opportunity presents itself.

We note that the court specifically noted that the programs at the prison are inadequate to deal with the personality problems from which Gollehon suffers. However, the record does not show that Gollehon would have benefitted from such programs if they existed, and the court so concluded.

The record also reveals that the court fully disclosed the reasons upon which it based its decision to sentence to death:

> An incomplete record in capital sentencing is constitutionally inadequate: there must be "full disclosure of the basis for the death sentence."

Smith, 914 F.2d at 1166, citing *Gardner v. Florida* (1977), 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393. The record being complete concerning the court's analyses, Gollehon's constitutional rights have not been violated.

In summation, we conclude that the District Court considered adequate evidence both of aggravating and

mitigating factors and considered them in their totality rather than weighing each factor by itself. The court concluded that the evidence presented by the State concerning the aggravating factors was shown "beyond a reasonable doubt." Further, the court stated that when weighed against the mitigating evidence, the cumulative nature of Gollehon's mitigating evidence was not "sufficiently substantial to call for leniency." *Walton v. Arizona* (1990), 497 U.S. 639, 649, 110 S.Ct. 3047, 3055, 111 L.Ed.2d 511, 525.

The proportionality review will be considered later.

We hold the District Court did not err by failing to rule, as a matter of law, that mitigating factors existed and that mitigating factors were substantial enough to call for leniency.

VII

Did the District Court err by sentencing Gollehon to death for the crime of deliberate homicide by accountability?

Gollehon argues that it is not legally permissible to sentence a defendant to death upon a conviction for the crime of deliberate homicide by accountability because no sentence for this crime is set by statute. Again, Gollehon argues he was acquitted of deliberate homicide. According to Gollehon, this Court must interpret ambiguous statutes favorably for the person against whom the enforcement is sought.

The State argues that deliberate homicide by accountability is not a separate crime from that of deliberate

homicide. According to the State, conviction of any felony "by accountability" carries with it the sentence for the underlying felony. Further, the State contends that § 45-1-102(2), MCA, dictates that all penal provisions be construed according to the fair import of their terms with a view to effect its object and to promote justice.

We emphasize our prior reasoning concerning deliberate homicide by accountability. Having been found not guilty of deliberate homicide, Gollehon still must contend with his conviction of deliberate homicide by accountability. The dissent states that Gollehon was specifically found not guilty of deliberate homicide and cannot, therefore, be sentenced to death. We disagree. Gollehon was found guilty of *deliberate homicide* by accountability. No matter how you juggle semantics, Gollehon was convicted of committing a deliberate homicide, the jury simply did not find he acted alone.

The dissent's reasoning only works if accountability is a separate crime for which the legislature failed to provide a remedy. Accountability is not an "off-shoot" homicide. It is a connection provided by our legislature that gives courts and juries a way to make people "accountable" or responsible for a crime that has definitely been committed. The responsibility for the crime attaches by way of acts committed by the accused. The accused either participated in a communal crime or aided, abetted another, or planned the crime.

The dissent refers to § 45-5-102, MCA, which in pertinent part states:

> **45-5-102. Deliberate homicide.** (1) A person commits the offense of deliberate homicide if:

> (a) he purposely or knowingly *causes* the death of another human being; (Emphasis supplied.)

The dissent concludes that Gollehon was specifically found not guilty of the offense of causing the death of another human being. By its verdict the jury found Gollehon not guilty of deliberate homicide. It also found him guilty of deliberate homicide by accountability. Here we emphasize that § 45-2-302, MCA, previously set out in this opinion, provides that a person is legally accountable for conduct of another when the described events occur – as a result, we conclude that Gollehon's conviction meets the requirements of § 45-5-102, MCA, as he did "cause" the death of Pileggi because he aided and abetted in the commission of the offense of deliberate homicide as required by statute. We therefore conclude that Gollehon has met the specific requirements of § 45-5-102, MCA, by his conduct in which he purposely or knowingly caused the death of Pileggi, whether by his own blow, or the blow of Turner whom he aided and abetted.

The evidence presented at this trial places Gollehon in the middle of a homicide with a bat in his hands. Pileggi was killed either by blows from Gollehon or Turner. Following the dissent's reasoning, anytime the fatal blow in a case cannot be attributed to *one* person, no person involved can ever get more than ten years as a sentence, no matter how heinous the crime. Thus, according to the dissent, the accountability statute must by its reasoning dilute criminal responsibility of all types rather than making all those responsible for a crime pay the same price. We conclude that the legislature never

intended the result that the dissent suggests. We determine that our legislature never meant to dilute responsibility for a criminal act when that act was committed by more than one person, but instead meant that all those participating in a crime be "accountable" for *the whole* of the responsibility of that act. Here, that act was deliberate homicide, which carries death as a possible sentence.

We note that Montana's statutes § 45-2-301 through 303, MCA, were taken from the Illinois Criminal Code sections 5-1, 5-2 and 5-3 (1961). This Court has already determined that when Montana adopts statutes from other states, we will also adopt the case law from that state which interprets the statute. *State v. Murphy* (1977), 174 Mont. 307, 311, 570 P.2d 1103, 1105.

Illinois has specifically upheld the death sentence when applied to those persons found guilty of murder (deliberate homicide in Montana) under the theory of accountability. *People v. Stanciel* (1992), 153 Ill.2d 218, 180 Ill.Dec. 124, 606 N.E.2d 1201; *People v. Ruiz* (1982), 94 Ill.2d 245, 68 Ill.Dec. 890, 447 N.E.2d 148.

> A charge based upon accountability must necessarily flow from the principal crime at issue. Accountability is not in and of itself a crime, but rather a method through which a criminal conviction may be reached. Simply, the statute is a statement of the principles of accessoryship.

Stanciel, 180 Ill.Dec. at 132, 606 N.E.2d at 1209.

This reasoning is no different than our own reasoning in prior cases:

> B.D.C.'s challenge on this ground has no basis in law. B.D.C. seems to be arguing that when one is

> charged with an offense by accountability, he or she is being charged with a separate or different offense. Accountability, however, is merely a conduit by which one is held criminally accountable for the acts of another. There is no separate offense, only the underlying offense which has been physically committed by another, but for which the defendant is equally responsible because of his or her conspiring or encouraging participation.

Matter of B.D.C. (1984), 211 Mont. 216, 220-21, 687 P.2d 655, 657.

Both Gollehon and Turner were convicted of deliberate homicide by accountability. Neither man was "acquitted" of deliberate homicide as they argue, and as the dissent argues, but only of committing the homicide alone. The deliberate homicide occurred; Gerald Pileggi is dead. However, which blow actually caused the death is indeterminable. It is also irrelevant.

> If a person has conspired to commit and facilitated the commission by another of a criminal act, he is no less guilty because he did not "pull the trigger."

Matter of B.D.C., 211 Mont. at 221, 687 P.2d at 657.

The jury was instructed correctly that they had to determine first that a deliberate homicide had occurred before they could reach a conviction of deliberate homicide by accountability. Gollehon's argument, therefore, that the death penalty is not a viable sentence for deliberate homicide by accountability is legally incorrect. Once determined responsible for deliberate homicide (acting alone) or for deliberate homicide by accountability (not

acting alone) the death penalty is an appropriate sentence:

> A person convicted of the offense of deliberate homicide shall be punished by death . . . , by life imprisonment, or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years, except as provided in 46-18-222.

Section 45-5-102(2), MCA.

Gollehon's and the dissent's argument concerning ambiguity in statutory instructions is not well made. Montana's accountability statutes are not ambiguous:

> *When accountability exists.* A person is legally accountable for the conduct of another when: . . . (3) either before or during the *commission of an offense* with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense. (Emphasis added.)

Section 45-2-302(3), MCA. The statute is clear that an offense must be committed before accountability attaches the responsibility for the crime to the accused. There is no question here that Gerald Pileggi was beaten to death with baseball bats. Further, sufficient evidence was presented at trial to show that both Gollehon and Turner struck Pileggi repeatedly with baseball bats. There is also no question that the jury convicted Turner and Gollehon of committing a deliberate homicide together. The fact that the jury could not assess the fatal blow to either person swinging a bat cannot, even with minimal logic,

be the cause of reducing responsibility for another's death to ten years as the dissent suggests.

We conclude that Gollehon's conviction of deliberate homicide by accountability means that 1) a deliberate homicide occurred and 2) Gollehon's actions before or during the commission of the homicide made him liable as a principal actor in that homicide. We further conclude that the death penalty is applicable to deliberate homicide by accountability.

We hold that the District Court did not err by sentencing Gollehon to death for the crime of deliberate homicide by accountability.

VIII

Did the District Court properly refuse to consider Gollehon's argument that death by hanging constitutes cruel and unusual punishment?

Gollehon argues that his death sentence is to be carried out by hanging which is cruel and unusual punishment in contravention to the Eighth Amendment to the United States Constitution. The State argues that Gollehon was free to choose death by lethal injection and did not do so.

> The punishment of death must be inflicted by hanging the defendant by the neck until he is dead or, at the election of the defendant, by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a licensed physician

> pronounces that the defendant is dead according to accepted standards of medical practice. A defendant who wishes to choose execution by lethal injection shall do so at the hearing at which an execution date is set, and if he does not, the option to choose death by lethal injection is waived.

Section 46-19-103(3), MCA.

This Court has already settled the question raised by Gollehon. In *State v. Langford* (1992), 254 Mont. 44, 833 P.2d 1127 this Court stated:

> Section 46-19-103(3), MCA, provides Langford the opportunity to elect between lethal injection and hanging as a method of execution. Clearly, Langford had ample opportunity to elect lethal injection over hanging, but chose not to do so. Accordingly, he rendered moot any claim concerning the constitutionality of hanging as a method of execution.

Langford, 254 Mont. at 46-47, 833 P.2d at 1129.

Our examination of the transcript reveals that the court attempted to clarify Gollehon's options and that his attorney understood the consequences of silence as to choice:

> THE COURT: This is a continuation of cause DC-91-01, State of Montana versus William J. Gollehon. Mr. Gollehon, under Section 46-19-103, I am required to impose this sentence between 30 and 60 days, and likewise, that statute requires for you to make an election of whether you want to die by hanging or lethal injection. I will set sentencing for May 11th

between the hours of 12:01 a.m. and 6:00 a.m. Do you have a preference for the method?

MR. DONAHOE: Your Honor, Mr. Gollehon with the respect to the election will stand mute, and I think that the statute requires that the finding be that he be hung. In that connection, Your Honor, I would bring to the Court's attention the fact that hanging may be unconstitutional as being cruel and unusual per se within the meaning of the 8th and 14th Amendment of the United States Constitution and under our own Montana Constitution. That issue in particular is being worked up I think through the Montana Courts right now and is now pending in the 9th Circuit Court of Appeals. I didn't bring it to the Court's attention before, obviously, because I didn't want to play my hand with regard to the sentence that the Court might be thinking about giving. In other words, I didn't want the Court to think that I thought that the death penalty was going to be imposed.

THE COURT: There is no problem there, Mr. Donahoe. What I want understood is that the election is to be exercised at this time by Mr. Gollehon, and if Mr. Gollehon does not request lethal injection, in that event that death by hanging survives any challenge to it, that he is, in essence, making an election to die by hanging. If that is understood, that is all. You are remanded to the custody of the Sheriff.

Sentencing hearing transcript March 16, 1992.

It is clear that both Gollehon and his counsel understood that if Gollehon chose not to speak in answer to the court's question concerning method of execution, he waived his right to election of methods. Having been

given a choice and yet waiving the alternative of lethal injection, Gollehon's arguments concerning cruel and unusual punishment by hanging are moot and will not be considered further.

IX

Should this Court uphold Gollehon's death sentence on automatic review?

This Court is charged pursuant to § 46-18-310(3), MCA, with determining whether the death sentence imposed in any given case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Section 46-18-310(3), MCA. Therefore, at Gollehon's request and pursuant to our responsibility we consider and compare all of the following cases, as we did in *Turner*, in which the death penalty was or could have been imposed:

> *State v. Langford* (1991), 248 Mont. 420, 813 P.2d 936; *State v. Kills On Top (Vern)* (1990), 243 Mont. 56, 793 P.2d 1273; *State v. Kills On Top (Lester)* (1990), 241 Mont. 378, 787 P.2d 336, *cert. denied*, [___ U.S. ___] 111 S.Ct. 2910 [115 L.Ed.2d 1073] (1991); *State v. Dawson* (1988), 233 Mont. 345, 761 P.2d 352; *cert. denied*, 491 U.S. 910 [109 S.Ct. 3200, 105 L.Ed.2d 708] (1989); *State v. Keefe* (1988), 232 Mont. 258, 759 P.2d 128; *State v. Keith* (1988), 231 Mont. 214, 754 P.2d 474; *State v. Smith* (1985), 217 Mont. 461, 705 P.2d 1087, *cert. denied*, 474 U.S. 1073, 106 S.Ct. 837, 88 L.Ed.2d 808 (1986), habeas corpus conditionally granted, 914 F.2d 1153 (9th Cir. 1990); *State v. Fitzpatrick* (1980), *on remand*, 186 Mont. 187, 606 P.2d 1343, *cert. denied*, 449 U.S. 891 [101 S.Ct. 252, 66

L.Ed.2d 118] (1980), *reversed on other grounds*, 869 F.2d 1247 (9th Cir.), *cert. denied*, 493 U.S. 872, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989); *State v. Coleman* (1978), 185 Mont. 299, 605 P.2d 1000 (1979), *cert. denied*, 446 U.S. 970 [100 S.Ct. 2952, 64 L.Ed.2d 831] (1980), *reversed on other grounds*, 874 F.2d 1280 (9th Cir.1989), *cert. denied*, [493 U.S. 944] 110 S.Ct. 349 [107 L.Ed.2d 337] (1989); *State v. McKenzie* (1976), 171 Mont. 278, 557 P.2d 1023, *vacated on other grounds*, 433 U.S. 905 [97 S.Ct. 2968, 53 L.Ed.2d 1089] (1977), *on remand*, 177 Mont. 280, 581 P.2d 1205 (1978), *vacated*, 443 U.S. 903 [99 S.Ct. 3094, 61 L.Ed.2d 871] (1979), *on remand*, 186 Mont. 481, 608 P.2d 428, *cert. denied*, 449 U.S. 1050 [101 S.Ct. 626, 66 L.Ed.2d 507] (1980), *vacated in part on other grounds*, 842 F.2d 1525 (9th Cir.), *cert. denied*, 488 U.S. 901 [109 S.Ct. 250, 102 L.Ed.2d 239] (1988).

We have examined the above cases with regard to the gravity of the offenses, the brutality with which they were committed and the existence of any factors meriting leniency.

We first note the heinous way in which Pileggi was killed. We also note that Gollehon was serving time for another deliberate homicide committed partially by the same brutal method.

Like the District Court, this Court acknowledges that the abuse Gollehon suffered as a child of unloving and brutal parents cannot be divorced from Gollehon's current behavior. However, also like the District Court we note an extensive history of criminal conduct with no remorse or compassion attached to such conduct.

Gollehon seeks to have this Court consider the murders committed in the prison riot and the fact that none of the inmates involved were sentenced to death. While both cases involved inmates killing inmates, we will not consider the riot case because it is not before us. What is before us is a deliberately calculated killing of one human being by two others wielding baseball bats.

We have considered this case in comparison to the aforementioned cases involving murder by beating, by beating and strangulation, by strangulation and injection of unknown substance and by shooting, strangulation and stabbing. The facts of this case are no less heinous than the *Kills On Top* cases in which the victim was beaten with a tire iron and a rock, was shot and then had his throat slit. We stated in *State v. Kills On Top* (1990), 243 Mont. 56, 793 P.2d 1273, that "[t]he homicide was senseless, calculated and brutal." *Kills On Top*, 243 Mont. at 109, 793 P.2d at 1309. So too is the homicide before us.

When considering proportionality we consider directives also from the United States Supreme Court:

> In *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, the court held that the death penalty may be imposed if defendant *killed, attempted to kill, or intended to kill or that lethal force be used*. This determination as to defendant's culpability need not be made by a jury, but may be made at any point in the state criminal process. *Cabana v. Bullock* (1986), 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704, *overruled in part on other grounds; Pope v. Illinois* (1987), 481 U.S. 497, 504, 107 S.Ct. 1918, 1922, 95 L.Ed.2d 439, 447. *See also Tison v. Arizona* (1987), 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127.

> Applying the rule of *Enmund* and *Cabana*, the sentencing court made the determination that defendant killed the victim. We conclude that the findings and conclusions by the sentencing court are properly within the provisions of the statutes and that there is no contradiction present casting doubt on the validity of the death penalty. Under our statutory provisions, the sentencing judge is clearly given the responsibility and power to make this determination. (Emphasis added.)

State v. Kills on Top (1990), 241 Mont. at 404, 405, 787 P.2d at 353.

The evidence presented at trial reveals that Gollehon killed Pileggi in concert with Turner. Thus, we find that the *Enmund* rule is also satisfied.

Having considered the evidence, prior Montana cases and directives by the United States Supreme Court and the Ninth Circuit, we independently conclude that Gollehon killed Pileggi in concert with Turner and that the death penalty is appropriate.

We affirm the sentence of death imposed by the District Court. This case is remanded to the District Court for the determination of the date of execution in accordance with Montana statutes.

Affirmed.

TURNAGE, C.J., HARRISON, J., and TED O. LYMPUS, District Judge,* concur.

GRAY, Justice, dissenting.

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* Sitting for McDONOUGH, J.

I concur in the Court's opinion on issues 1 through 4 and 6. I dissent from the opinion on issues 5 and 7.

With regard to issue 5, it is my view that the statutory aggravating circumstances which the District Court found to exist do not exist in this case as a matter of law. This Court's conclusion to the contrary rests primarily on its statement that the jury did *not* find Gollehon not guilty of deliberate homicide, but only found that he did not act alone during the crime. The Court then quotes the legally correct instruction on accountability in seeming support of the application of the two aggravating circumstances at issue here. The Court is in error.

The Court's statement is incorrect and insupportable on the record before us. The record is clear that Gollehon was charged with, and acquitted of, deliberate homicide; he was charged in the alternative with accountability for deliberate homicide and convicted of that charge.

Nor does the quoted instruction support the Court's conclusion. The instruction properly directed the jury that, to convict Gollehon of accountability for deliberate homicide, it need only find that a deliberate homicide was committed and that either or both defendants "either before or during" the commission of the offense solicited, aided or abetted the other in the "planning or commission of the offense." Nothing in the instruction required the jury to find that Gollehon committed the offense of deliberate homicide.

To apply the aggravating circumstances at issue here required the District Court to make two determinations. First, the court had to find that the offense involved was deliberate homicide. There is no dispute about that fact.

Second, however, the court had to find that the offense *was committed* by Gollehon. See § 46-18-303(1) and (2), MCA. Given Gollehon's acquittal on the deliberate homicide charge and the instruction requiring only that the defendant solicit, aid or abet before *or* during the commission of the offense regarding the planning *or* commission of the offense, it is my view that the District Court could not make the second determination required for application of the aggravating circumstances at issue. This Court has stated that "without the finding of a statutory aggravating circumstance, the death penalty is inappropriate." *State v. Keith* (1988), 231 Mont. 214, 240, 754 P.2d 474, 489. I conclude that the death penalty cannot be imposed here because no statutory aggravating circumstance exists.

In addressing issue 7, the Court concludes that the District Court did not err as a matter of law in imposing the death penalty on Gollehon. It reaches this conclusion by focusing primarily on the nature of "accountability," rather than on Montana's sentencing statutes. The Court relies on Illinois cases interpreting the "parent" of our accountability statute; the Court does not, however, examine whether Montana's *sentencing* statutes are adopted from Illinois or even whether they are similar to those in effect in Illinois so as to legitimize the use of the *Stanciel* and *Ruiz* cases in resolving this important issue which is truly a matter of life and death. For those reasons, and because it is my view that an appropriate analysis of Montana's sentencing statutes precludes application of the death penalty to Gollehon's conviction for accountability for deliberate homicide, I dissent.

The death penalty may be imposed in Montana only under the limited circumstances provided by statute. Specifically, that sentence is available for the offenses defined in §§ 45-5-102(a) and (b), 45-5-303, and 46-18-220, MCA. Only § 45-5-102, MCA, is relevant here.

Section 45-5-102, MCA, describes when a person has committed deliberate homicide. Such an offense is committed when a person "purposely or knowingly causes the death of another human being." Section 45-5-102(1)(a), MCA. Gollehon was charged with, and specifically found not guilty of, this offense. Pursuant to § 45-5-102(1)(b), MCA, the offense of deliberate homicide for which the death penalty is available also includes the crime commonly referred to as "felony murder." This offense is not at issue here. Thus, the death penalty available for these offenses pursuant to § 45-5-102(2), MCA, is not available here.

Moreover, with regard to § 45-5-102, MCA, the statute makes it clear that the legislature is aware of how to include what we might call "offshoot" homicides – such as felony murder – in the definition of the offense of deliberate homicide for which the death penalty is available. The legislature specifically included felony murder; it did not include accountability for deliberate homicide.

Other statutes also must be scrutinized to determine the applicability of the death penalty in this case. Section 45-2-302, MCA, describes when a person is legally accountable for the conduct of another. It is this accountability for deliberate homicide of which Gollehon was convicted. That statute does not include any sentencing provision. Other statutes addressing indirect offenses,

such as "conspiracy" and "attempt," do contain sentencing provisions. Those statutes, §§ 45-4-102(3) and 45-4-103(3), MCA, essentially provide for the same sentence as the underlying offense. Again, it is clear that the legislature knows how to include sentencing cross-references when it desires and intends to do so. It did not do so with regard to accountability.

The Montana legislature has provided a "fall back" sentence to cover convictions for which it does not specify a penalty. Section 46-18-213, MCA, mandates that when no penalty is otherwise provided for a felony, the sentencing court may sentence for any term not to exceed 10 years in the state prison, a fine not to exceed $50,000, or both. I conclude that this statutory penalty applies to Gollehon's conviction.

The Court suggests that it is I, through my reasoning, who would allow the perpetrator of a heinous crime to be sentenced to a maximum of ten years' imprisonment. This is not so. The fact is that it is the *legislature's* job – not mine or this Court's – to determine appropriate sentences for criminal offenders. The legislature has not clearly provided for the imposition of the death penalty under these circumstances. If its failure to do so is an unintended result of legislative oversight, the legislature can, and should, correct it. Absent such an action, a proper interpretation of the legislature's intent as reflected in present sentencing statutes is that the death penalty is not available here.

It is my view that the Court's conclusion on this issue violates the most fundamental canons of both judicial

function and statutory interpretation. It has not interpreted the statutes at issue here in accordance with their plain meaning. Rather, it has inserted into the statutes a criminal sentence – the most severe and final sentence of all – not provided for by the Montana legislature, in direction [sic] contravention of § 1-2-101, MCA. I cannot agree.

The Court's approach also represents a radical departure from the rule of lenity which has been embraced by this Court in interpreting penal statutes and from its own controlling, and recent, precedent. In *State v. Goodwin* (1991), 249 Mont. 1, 813 P.2d 953, and *State v. Van Robinson* (1991), 248 Mont. 528, 813 P.2d 967, we affirmed our commitment to the following "classic rule of construction of criminal statutes" in construing sentencing statutes:

> Penal statutes are construed with such strictness as to safeguard the rights of the defendant. . . . [P]enal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Nothing can be read into penal statutes by implication.

Goodwin, 813 P.2d at 966 (citation omitted). *See also Van Robinson*, 813 P.2d at 971, quoting *Goodwin*. I submit that the Court's analysis on this issue violates this classic rule by extending the death penalty to a person and acts not within either the terms or the fair and clear import of the language used by the Montana legislature. The death penalty will be imposed on Gollehon by implication.

This Court also has agreed – until now – with the following United States Supreme Court articulation of the rule of lenity:

> First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . " Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should defined [sic] criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the law-maker has clearly said they should." Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

Goodwin, 813 P.2d at 967 (citations omitted). This classic and governing rule is applicable here and mandates a conclusion that the death penalty cannot be imposed on Gollehon. Yet, the Court totally ignores even the existence of the rule of lenity in analyzing the availability of the death penalty in this case. The Court's confusing references to *Goodwin* in the companion case of State v. Turner certainly provide no help in fostering clarity in this regard. We are left to wonder whether this case signals

the death knell of the rule of lenity in Montana or, alternatively, whether the Court intends to continue to embrace that rule only where the underlying facts are less brutal and horrifying than those encompassing the death of inmate Pileggi.

I feel no sympathy for Gollehon. Indeed, the brutality of the acts upon which his conviction is based is surely beyond the understanding and even the imagination of every decent and rational human being. The fact remains, however, that the Montana legislature has not provided for application of the death penalty here. I cannot allow my horror over the circumstances of this crime to override my view of the result necessary here as a matter of law. I would remand this case to the District Court for resentencing.

TRIEWEILER and HUNT, JJ., join in the foregoing dissent.

ORDER

Appellant, William Gollehon has filed a petition for rehearing from this Court's opinion published on October 20, 1993, see page 252. The State has filed a response. Gollehon merely reargues his case and his petition is, therefore, denied. However, we issue the following statement for clarification as to Gollehon's allegation of discovery abuse.

The State actually sent Gollehon two letters concerning lists of evidence. The first letter was sent on April 12, 1991, and contained a list of 211 pieces of evidence. The July 1, 1991, Disclosure Statement adds two more pieces

of evidence not in the first list, making the July list total 213 pieces of evidence.

In the April letter, the State declares: "Please let me know which of these documents you have not received and I will supply copies to you." The record in this case is devoid of any subsequent request from Gollehon for any of the 211 pieces of evidence.

Based upon Gollehon's lack of response to the State's April 12 request, the State had the right to "assume" that Gollehon had in his possession all of the 211 pieces of evidence. We must also assume that Gollehon had copies of items 212 and 213 (videos of inmate interviews and another interview with an inmate witness) because he did not object to any discovery violation until during trial.

This Court was presented on appeal with an allegation that Gollehon did not have certain exculpatory evidence which the State was under a duty to present. Further, this Court was presented a record that did not contain many of the 213 items of evidence on the July list.

The State had the right to assume that Gollehon had the 213 pieces of evidence. The statute concerning disclosure by the State specifically declares that the defendant must "request" certain material held by the State which "tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence." Section 46-15-322(1)(e), MCA. We must assume that Gollehon did not make any specific request because there is no evidence of such request in the record. What is in the record is the State's attempt to comply with that production of evidence by

requesting that Gollehon check his files and determine what he did not have.

Whether Gollehon actually had these items is not the legal question presented to the Court. The facts present us with a situation which requires only that we determine whether the State met its statutory responsibility. The opinion concluded that the State had satisfied its responsibility.

The facts show that Gollehon was given the opportunity to request anything from the first 211 items of evidence. The law clearly states that the responsibility was on Gollehon to make the request. (The second part of § 46-15-322, MCA, lists the information that the State "shall" provide to defendant.)

The opinion is written correctly according to the evidence and the record presented to this Court.

IT IS ORDERED that Gollehon's petition for rehearing is denied. A true copy of this Order shall be sent to all attorneys of record.

TURNAGE, C.J., HARRISON and GRAY, JJ., and TED O. LYMPUS, D.J.,* concur.

TRIEWEILER and HUNT, JJ., would grant the petition for rehearing.

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* Sitting for McDONOUGH, J.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-99005
CT/AG#: CV-95-00037-H-CCL

(Filed Jan. 31, 2000)

WILLIAM JAY GOLLEHON

Petitioner – Appellant

v.

MICHAEL MAHONEY, Warden,
Montana State Prison,

Respondent – Appellee

NO. 98-99027
CT/AG#: CV-95-00037-CCL

WILLIAM JAY GOLLEHON

Petitioner – Appellant

v.

MICHAEL MAHONEY

Respondent – Appellee

APPEALS FROM the United States District Court for the District of Helena, Montana.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that these appeals in this cause be, and hereby are DISMISSED AS MOOT, AND REMANDED.

Filed and entered January 3, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-99005
No. 98-99027

WILLIAM JAY GOLLEHON,

Petitioner-Appellant,

-vs-

MICHAEL MAHONEY, WARDEN,
MONTANA STATE PRISON,

Respondent-Appellee.

OPENING BRIEF OF PETITIONER-APPELLANT

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* * *

II. ISSUE PRESENTED FOR REVIEW

Whether the district court erred in dismissing Gollehon's pre-Antiterrorism and Effective Death Penalty Act habeas corpus petition instead of employing the abeyance procedure discussed in *Calderon v. United States District Court for Northern Dist. of California ("Thomas")*, 144 F.3d 618 (9th Cir. 1998).

III. STATEMENT OF BAIL STATUS

Appellant William Jay Gollehon (Gollehon) is currently incarcerated at Montana State Prison awaiting execution of his death sentence.

VII. ARGUMENT

Whether 28 U.S.C. § 2244(d)'s one year limitations period limits federal jurisdiction or is subject to equitable tolling has been decided by this Court and three other courts of appeals. These decisions hold that § 2244(d)'s one year statute of limitations does not operate as a jurisdictional bar and can, in appropriate circumstances, be equitably tolled. *See Calderon v. U.S. District Court for the Cent. Dist. of California,* 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied* 118 S.Ct. 899 (1998); *Miller v. New Jersey State Dep't of Corrections,* 145 F.3d 616, 618 (3rd Cir. 1998); *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir.), *cert. denied* 119 S.Ct. 210 (1998); and, *Davis v. Johnson,* ___ F.3d ___, 1998 WL 733731 (5th Cir. 1998). Other courts have taken a contrary position and ruled that when § 2244(d) applies the habeas petitioner must show literal conformity to its terms or else suffer a time barred dismissal of his habeas corpus petition.

Curtis v. Class, 939 F.Supp. 703 (D.S.D. 1996) best illustrates the latter type of reasoning. There, the court ruled that the habeas applicant's July 11, 1996, petition was time-barred under 28 U.S.C. § 2244(d). In reaching this conclusion the court made two findings pertinent to this discussion. First, that the one year limitations period in § 2244(d) became effective and applicable on April 24, 1996 when it was signed into law. And, second, that under the retroactivity analysis set forth in *Landgraf v. USI Film Products,*[3] § 2244(d) does not attach new legal consequences to events completed before its enactment.

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[3] 511 U.S. 244, 114 S.Ct. 1483 (1994).

If nothing else these cases point up the possibility of substantial disagreement concerning the effect of the one year limitations period in § 2244(d) on habeas corpus petitions filed after April 24, 1996, which involve events and circumstances that occurred before, and sometimes long before, that date. Insofar as this case is concerned the possibility that § 2244(d) may apply presents a problem because if the courts of appeals divide on whether § 2244(d) is jurisdictional, that controversy would undoubtedly be resolved by the Supreme Court. And, moreover, there is some indication that a majority of the Supreme Court could be convinced that § 2244(d) is jurisdictional.

For example, in his dissent in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, Chief Justice Rehnquist made it clear that in his view § 2254(d), the newly amended statute at issue in *Lindh*, was only procedural in nature, regulated tertiary conduct, and most important, was jurisdictional. *Id.* at 2070-71. In other words, according to the Chief Justice, and the three Justices who joined him, immediate application of § 2254(d) was required, even if that resulted in denial and/or dismissal of Lindh's case. In fact Chief Justice Rehnquist's dissenting analysis in *Lindh* bear a remarkable thematic resemblance to *Curtis v. Class*, 939 F.Supp. 703 (D.S.D. 1996), which we discussed *supra;* as do the dissenting opinions of Justice's Thomas and Scalia in *Stewart v. Martinez-Villareal*, ___ U.S. ___, ___, 118 S.Ct. 1618, 1622-26 (1998).

This possibility that the Supreme Court could determine that § 2244(d) is jurisdictional casts doubt on the district court's analysis of this issue in Gollehon's case. Without hesitation the district court found that § 2244(d)

will pose no barrier to Gollehon's return to federal court once his claims are exhausted. (*See* Aug. 16 Order denying Rule 60(b) relief, ER at pp. 213-217). But if the dismissal of Gollehon's present and pre-AEDPA habeas corpus petition is affirmed, and the Supreme Court ultimately decides that 2244(d) is jurisdictional and applicable to events before April 24, 1996, federal habeas review of Gollehon's case would be completely foreclosed. So, given the obvious uncertainty surrounding this issue caution, not confidence, should be the standard.

Using the time table set forth in our appendix we expect that Respondent will argue as follows, if the Supreme Court decides that § 2244(d) is jurisdictional:

> Gollehon's case became final on October 3, 1994, the day that the U.S. Supreme Court denied certiorari on his direct appeal from the Montana Supreme Court.
>
> Gollehon did not properly file a state postconviction petition until December 2, 1996.
>
> Therefore, more than one year elapsed from the date Gollehon's case became final and his post AEDPA habeas corpus petition is subject to dismissal for this reason.

Of course this anticipated argument assumes, but does not concede, two crucial points. First, that 2244(d)'s one year time limitation applies to capital cases. And second, that Gollehon's state court out of time new trial motion and his June 2, 1995, federal habeas corpus petition do not fall within the tolling provisions of 28 U.S.C. § 2244(d)(2). But given present uncertainty surrounding the effect of § 2244(d) these assumptions are more than reasonable.

In addition to these reasonable assumptions, other factors favor allowing Gollehon to employ the abeyance procedure set forth in *Calderon v. United States District Court for Northern Dist. of California ("Thomas")*, 144 F.3d 618 (9th Cir. 1998). For example, the abeyance procedure brings certainty to a decidedly uncertain situation. Furthermore, allowing abeyance in Gollehon's case would remove any hint of arbitrariness. In other words, from the cases we know that some death row habeas corpus petitioners have been permitted to amend out their unexhausted claims, exhaust them, and then reamend those claims back into their respective pre-AEDPA habeas petitions. Hence, denying Gollehon the right to amend, delete, and reamend would apparently turn on nothing more than the fact that Gollehon happens not to be in a district where such a procedure is being employed. Such a momentous decision in a death penalty habeas corpus case should not turn simply on the petitioner's location. That would violate due process and equal protection principles emanating from the Fifth Amendment of the United States Constitution.

Additionally the Court should consider that in trying his case in the state trial court, and in pursuing his direct appeal, Gollehon did his best to present and perfect all of his federal constitutional claims while he was in state court the first time. In fact, the only reason that Gollehon is back in state court now exhausting his *Brady* claims is that the state withheld crucial evidence from him, which in turn made it impossible to exhaust those claims in the framework of the trial – direct appeal process. So in reality the state parlays its withholding of evidence into an opportunity to completely deny Gollehon any sort of

federal review. Because if the district court's decision to dismiss is affirmed and in the meanwhile § 2244(d) is found to be jurisdictional, thereby barring Gollehon from federal court, no federal review will occur as a result of the state's having forced Gollehon back into state court to exhaust claims he did not know existed. Moreover, when this is coupled with the fact that Gollehon did indeed exhaust his *Brady* claims by filing and appealing the denial of his out of time new trial motion, only to have the Montana Supreme Court deny him the right to use that recognized procedure, the result is particularly unjust.

VIII. CONCLUSION

WHEREFORE Gollehon prays that this Court will reverse the district court's decision to dismiss Gollehon's pre-AEDPA habeas corpus petition and direct the district court to employ instead the abeyance procedure endorsed by this Court in *Calderon v. United States District Court for Northern Dist. of California ("Thomas")*, 144 F.3d 618 (9th Cir. 1998).

* * *